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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WALTER KENNETH BYRD,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS, WARREN COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant, whose conviction is upheld by a court of appeals, is denied due process of law and equal protection of the law where a conviction of a jointly charged, indicted, tried and convicted defendant, on the same offense, is reversed by the same court, on the basis of evidence that is equally applicable to both defendants.

2. Whether an initial unlawful arrest, search and seizure that leads to a further search and seizure, which leads to a consent to search a motor vehicle, which leads to a search warrant, sufficiently taints the evidence that is seized pursuant to the search warrant, which would not have been seized but for the initial illegality, such that the evidence must be excluded from evidence.

3. Whether a defendant is denied due process of law when he is convicted on the basis of circumstantial evidence that is equally consistent and reconcilable with a reasonable theory of innocence, and where that evidence does not prove beyond a reasonable doubt each and every element of the offense charged.

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The opinion of the Warren County Court of Common Pleas, granting in part and denying in part the Defendant's Motion to Suppress, dated August 5, 1986, remains unreported to the knowledge of the petitioner. This opinion appears in the appendix.

The decision of the Court of Common Pleas of Warren County, Ohio, per Judge P. Daniel Fedders, dated August 13, 1986, entering the judgment of conviction of the Defendant, is unreported to the petitioner's knowledge and appears in the appendix.

The opinion of the Court of Appeals for the Twelfth Appellate District of Ohio, Warren County, dated June 29, 1987, remains unreported to the knowledge of the petitioner. This opinion appears in the appendix to this petition.

——The decision of the Supreme Court of Ohio, by Chief Justice Thomas J. Moyer, dated November 4, 1987, remains unreported. A copy of this opinion is contained in the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Ohio denying leave to appeal, and denying claimed appeal as of right, was filed and entered on November 4, 1987. The decision and judgment entry of the Court of Appeals for the Twelfth Appellate District of Ohio, Warren County, was filed and entered on June 29, 1987.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONST. AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U. S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction of thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

O. R. C. § 2925.03(A)(2)

No person shall knowingly do any of the following: Prepare for shipment, ship, transport, deliver, prepare for distribution or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another.

STATEMENT OF THE CASE

The federal questions sought to be reviewed in relation to the Fourth Amendment of the United States Constitution were originally raised on the trial court level by written motion to suppress, with a hearing before the court. The trial court granted in part and denied in part the motion to suppress. (See Decision and Entry, Appendix at A). The federal questions in relation to the Fourth Amendment, and in relation to the third question presented for review were brought before the Court of Appeals for the Twelfth Appellate District, Warren County, Ohio, by assignment of error. (See Memorandum Decision and Judgment Entry,

Appendix at E-1). Finally, all federal questions sought to be reviewed by this petition, including the Fourth Amendment, the Fifth Amendment, and the Fourteenth Amendment, referred to the Supreme Court of the State of Ohio, but those questions were denied review. (See Entry, Appendix at C). The issues in relation to the equal protection clause and due process clause, brought under the first question presented for review in this petition, did not appear and were not apparent until after the Court of Appeals made its decision. Therefore, those questions were not brought up in the appeal from the trial court level.

The Petitioner, Walter Byrd, had been in the Cincinnati, Ohio area visi-

ting relatives for the Christmas holiday, 1985-1986. He had come up from New Orleans, stopping in Atlanta to pick up a friend, Mark Mueller, who also had family in the area.

Sometime shortly after checking into the Best Western Motel in Cincinnati, Byrd and Mueller were joined by their girlfriends, who stayed a few days there with them. The group rented two rooms, 143 and 144. Petitioner had visits from his son, Walter "Tex" Byrd, Jr., and other friends as well.

On the day of the arrests, the staff at the motel reported an argument (occurring at the motel) to the Sheriff's Department, asking for an officer to be dispatched, saying that "there was

an argument and a gun was found in the next room." A mad had earlier discovered a pistol which had been left in Room 144 by one of its occupants. The presence of the gun was also reported to the Sheriff's Department. Officer James Goodall was dispatched to the scene. Officer Goodall had also been involved with the police surveillance of these two rooms over the past week. Byrd's girlfriend, Vickie, had just gotten into her car to leave the motel, on her way to her mother's, when Officer Goodall arrived.

On arriving at the scene, Officer Goodall received directions from the motel management as to where the argument had occurred, being Room 143. He drove to those rooms and immediately placed

his patrol car behind the Cadillac, which Vickie had just gotten into to drive to her mother's. The patrol car was placed so that the Cadillac could not be moved. Officer Goodall testified that his intention was to prevent the car and the occupant from leaving.

At this point, Goodall asked Miracle for identification. He at no point asked her about the disturbance he was allegedly there to investigate. He retained Miracle's identification in his possession, left his car behind hers, and instructed her to turn off her engine.

The Petitioner, Byrd, inside Room 143, noticed the presence of the officer, opened the motel room door, and asked

the officer what the problem was. The officer asked him for identification. At no time did Officer Goodall inquire about the disturbance he was there to investigate or about the pistol, and at no time were there any objective signs to indicate a disturbance or violence had taken place.

Byrd testified that he indicated that the officer was to wait where he was while Byrd returned to the room's interior for his identification. The officer ignored this instruction and instead followed Byrd into the room. While Byrd was going through his suitcase looking for identification, Officer Goodall noticed in the suitcase what appeared to be a shoulder holster for a gun. Goodall did not act immediately

after noticing the holster, but waited until after Byrd moved away from the suitcase to take any action.

After Byrd turned away from the suitcase, Goodall placed all occupants of the room "against the wall". The occupants included Petitioner Byrd, his friend Mark Mueller and his girl-friend, Byrd's minor son, and Vickie, who eventually returned to the room. Goodall had still not inquired as to the nature of the disturbance he was sent there to investigate or to the presence of any weapon.

After other officers arrived, Goodall searched the suitcase, first discovering the shoulder holster to be empty. At this point, all persons in the room were in a secure position.

There were no threats made against the officers. Goodall still did not ask about a disturbance or a weapon, but proceeded to search the rest of the suitcase, producing what Officer Goodall suspected was a silencer. Still, no weapon had been discovered. Rather than stop here, officer Goodall and the backup officers continued to search the persons. After Goodall found (in the suitcase) the thing he believed to be a silencer, all persons were formally arrested for weapons violations, although Goodall testified he didn't know who, if anyone, had actually committed a crime at that point.

The officers then searched a blue Chervolet rental car, which was also

in Byrd's possession at the scene. Byrd had asked Officer Goodall if Byrd's son could be permitted to leave in that car, and Goodall refused unless a consent to search the car was signed. Byrd signed the consent form on the understanding that his son could take the car. After the car was searched, Byrd's son was not released.

The search of this car yielded three glass vials containing a residue white powder of an undetermined nature, but which the officer suspected was cocaine. Nothing was done to confirm or dispel these suspicions at the scene. Nevertheless, the officer used his suspicions about these vials, combined withi his suspicions as to the Petitioner's possible drug activity, to obtain

a search warrant for the Cadillac and the motel rooms. This search was conducted, yielding small amounts of marijuana and other personal items that, until the day before the arrest, had been in storage for over six months, including clothes, personal items. There were also many items of drug paraphernalia in the rooms which were used by Byrd while he was addicted to cocaine the previous year (these things were in storage for six mônths). The only cocaine offered into evidence was found among those things taken from the motel room, pursuant to the search warrent, being a small amount (3.0 grams altogether) of residue of a white powder found in four small glass bottles, being a mixture of caf-

feine, lidocaine, and cocaine.

The Petitioner Byrd was convicted of drug abuse and aggravated trafficking in drugs based on this evidence. Mueller (codefendant) was convicted of aggravated trafficking. Those convictions were appealed to the Twelfth District Court of Appeals for Warren County, Ohio. That Court reversed Mueller's conviction based on the manifest weight of the evidence. Byrd's convictions, based on the same evidence, was affirmed. The case was appealed to the Supreme Court of Ohio, but review was denied.

ARGUMENT

FIRST QUESTION PRESENTED FOR REVIEW:

WHETHER A DEFENDANT, WHOSE CONVICTION IS UPHELD BY A COURT OF APPEALS, IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WHERE A CONVICTION OF A JOINTLY CHARGED, INDICTED, TRIED AND CONVICTED DEFENDANT, ON THE SAME OFFENSE, IS REVERSED BY THE SAME COURT, ON THE BASIS OF EVIDENCE THAT IS EQUALLY APPLICABLE TO BOTH DEFENDANTS.

The Petitioner in this case was jointly indicted, tried, and convicted (of aggravated trafficking) with William Mark Mueller. All evidence was presented against them jointly. They were both traveling from Atlanta to Cincinnati, both changing motels frequently, and both were in the room with the drug paraphernalia while those things were at the motel. Mueller's conduct is even mentioned frequently in the Court of Appeals' decision on Byrd's case.

Mueller's conviction for aggravated trafficking was reversed, by the same Court that affirmed Byrd's conviction, on the ground that there was insufficient evidence to base a conviction. Ohio v. Mueller, Case No. 86-08-056 (June 1, 1987). There is no distinction made between the Petitioner and Mueller by the Court of Appeals. In fact, in Mueller's decision, the Court refers to Byrd's "reasonable theory of innocence":

> None of the evidence presented by the State is irreconcilable with the reasonable theory of innocence that appellant was merely in the company of a former cocaine addict who had removed numerous items from storage, including some drug paraphernalia, and brought the items to their motel room so that his ex-girlfriend could separate her personal belongings.

This is the exact same argument that was made by Byrd, which is equally applicable to Byrd as to Mueller. All evidence in this case is equally applicable to both Defendants as to the possibility that they were preparing a controlled substance for shipment or distribution, an essential element of their conviction. Although the paraphernalia was admittedly Byrd's property, both Defendants had equal access to those items at the motel room. Access to and use of the items, and not ownership is the only issue relevant to whether or not they had prepared a controlled substance for shipment or distribution. If there was not proof that Mueller had prepared

a controlled substance for shipment or distribution, there could likewise be no proof that Byrd could have done so.

The Ohio Supreme Court has earlier determined that it was not error to reverse a conviction for one Defendant, and not for a Codefendant, where the the evidence was not equally applicable to both Defendants. Marcoguisseppe v. Ohio, 114 Ohio St. 299, 151 N.E.2d 182. Therefore by implication, evidence equally applicable to both Defendants should create the same result, which in this case means that evidence insufficient to convict one Defendant is insufficient to convict the other. Such was the result in the Sixth Circuit, where the Court held that equal pro-

tection of the law and due process of law under the fifth and fourteenth amendments to the United States Constitution require that all litigants similarly situated may appeal to Courts for relief and defense under like conditions, with like protection and without discrimination between them. Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956), cert. denied, 352 U.S. 870; U.S. Const. amend V; U.S. Const. amend XIV.

Equal protection under the law and due process of law requires a Court to apply evidence equally to similarly situated persons. This Court must correct the inequity that has resulted in the Court below, by reviewing this case and reversing Byrd's conviction

based on the Constitutional issues that have been raised herein.

SECOND QUESTION PRESENTED FOR REVIEW: WHETHER AN INITIAL UNLAWFUL ARREST, SEARCH AND SEIZURE THAT LEADS TO A FURTHER SEARCH AND SEIZURE, WHICH LEADS TO A CONSENT TO SEARCH A MOTOR VEHICLE, WHICH LEADS TO A SEARCH WARRANT, SUFFICIENTLY TAINTS THE EVIDENCE THAT IS SEIZED PURSUANT TO THE SEARCH WARRANT, WHICH WOULD NOT HAVE BEEN SEIZED BUT FOR THE INITIAL ILLEGALITY, SUCH THAT THE EVIDENCE MUST BE EXCLUDED FROM EVIDENCE.

The evidence procured in this case and offered against this Defendant was taken pursuant to an illegal arrest, an illegal search and seizure, and a search warrant not supported by probable cause. The evidence basing the conviction was derived in complete exploitation of those original illegalities and therefore must be suppressed in its entirety. The lower courts

failed to properly apply this Court's rulings to the important questions of federal law involved.

A. The Arrests, searches and seizures in this case were illegal and therefore all evidence derived therefrom must be suppressed.

The Fourth Amendment to the United States Constitution protects all persons from unreasonable searches and seizures. U.S. Const. amend. IV. A "seizure" under the Fourth Amendment is defined as the point at which a "reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544 (1980). At the point when Walter Byrd was ordered to a position against the wall in his motel room, he was not free to leave and was under arrest. There was the

threatening presence of several officers, the display of the officers' weapons, as well as the forceful use of tone and language by the officers. Also, the officers retained Byrd's identification. All are indications of a full arreset. Mendenhall, supra at 508-09; Florida v. Royer, 460 U.S. 491 (1983).

An arrest requires probable cause to believe the person in question has committed the crime in question. Dunaway v. New York, 442 U.S. 200)1979); Royer, supra. The officer testified at the trial court that at the time he placed Byrd against the wall i.e., he arrested him, the officer did not know whether any crime had occurred. This is a blatant admission that the arrest was illegal. Nevertheless, because there

was no basis at that point for believing a crime had occurred, the arrest was illegal regardless of the officer's testimony. See Sibron v. New York, 392 U.S. 40 (1968).

The State cannot show any basis or support for this illegal arrest. The scope and bounds of a temporary investigative stop were clearly exceeded, to a gross degree. Terry v. Ohio, 392 U.S. 1 (1968); United States v. Hensley, 469 U.S. 221 (1985); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Berkemer v. McCarty, 468 U.S. 420 (1984). Further, the arrest was at the Defendant's home. An arrest at a person's home can never be justified without a valid warrant. Welsh v. Wisconsin, 466 U.S. 740 (1984); Payton

v. New York, 445 U.S. 573 (1980). There are no "exigent circumstances" in this case that justify the application of an exception to that rule. Welsh, supra; Stealgald v. United States, 451 U.S. 204 (1981). It is clear that a motel room is a home for fourth amendment purposes. United States v. Jeffers, 342 U.S. 48 (1951).

Any searches that occurred subsequent to that initial and unlawful arrest were also illegal. A search has occurred where one's reasonable expectation of privacy has been violated by government intrusion. Katz v. United States, 389 U.S. 347 (1967). Byrd clearly had a reasonable expectation of privacy in his motel room because he was using the room as his home at

the time of the intrusion. It was his home for purposes of the Fourth Amendment. Jeffers, supra.

The initial intrusion by the police officers looking into Byrd's motel room door was the first violation of this Defendant's reasonable expectation of privacy. In addition, the officer seized the shoulder holster and searched Byrd's suitcase, his person, and the blue rental car in his possession during a warrantless search. Searches and seizures conducted without a warrant are per se unreasonable, subject to very few exceptions. See Katz, supra. None of these exceptions apply here.

The "plain view" doctrine is clearly inapplicable to this case. The initial intrusion was unlawful; the discovery

of the evidence was not inadvertent (since the officers went into the room expecting and hoping to find contraband); and the incriminating nature of the items were not immediately apparent (nothing was found which could be proved to be contraband without scientific testing, if at all). Texas v. Brown, 460 U.S. 730 (1983);

The search warrant itself in this case was not supported by probable cause (regardless of whether the basis for that warrant was illegally obtained or not). The affidavit supporting the search warrant contained only unsupported statements of unnamed, unreliable informants, with the officer's suspicions concerning the items he had already found at the Defendant's premises,

none of which were contraband. This type of information cannot be the basis for probable cause or for a valid search warrant.

The State Court of Appeals agreed in this case that the arrest and the initial search of the suitcase was unlawful. Therefore all evidence resulting from the initial illegality should have been excluded from trial. This case involves a wide range of constitutional issues relating to the law of search and seizure, and should be decided by this Court to clearly set the limits of police conduct in this regard.

B. Evidence which is obtained through exploitation of a prior illegality is as excludible from evidence as the original illegality itself.

Although the State Court of Appeals held that this case started with an illegal arrest, search and seizure, that Court held that the connection between the unlawful arrest and the discovery and seizure of the evidence was so attentuated as to dissipate the taint, and therefore the illegality did not require exclusion of the evidence. This result is incorrect and leads to an unreasonable result when considering all of the facts of this case.

First, it must be clear how the officers obtained the evidence in this case. The only cocaine in evidence, as well as the numerous items of drug paraphernalia found in the motel room, were obtained through the use of a

search warrant (although the police officers had previously been in the room and saw the items before a search warrant was obtained). The officer's own testimony was that the justification for obtaining that search warrant was the items found in the blue rental car (none of which were illegal of themselves). This search was pursuant to the consent of Byrd, which was given on the understanding that his minor son would be released from the room once the search was performed. Byrd's consent, and the search pursuant thereto, could not have been obtained without his continued detention by the police officers. Both the trial court and the Court of Appeals agreed that this detention was illegal. The continued

detention was justified by the contents of the suitcase, the search of which both Courts also agreed was illegal. All evidence was derived from, and would not have been obtained but for, the initial unlawful arrest, search and seizure of Walter Byrd.

The law is clear that the "exclusionary prohibition applies as well to indirect as well as the direct products of such [unlawful searches and seizures]." Wong Sun v. United States, 371 U.S. 471, 489 (1963); See also Segura v. United States, 468 U.S. 796, 882 (1983); United States v. Crews, 445 U.S. 463, 470 (1979). The two cases relied on by the Court of Appeals, Wong Sun and Segura, are unequivocably in the Petitioner's favor on the issue

of exclusion of this evidence.

In Wong Sun, this Court held that it would be "unreasonable" to believe that a suspect's statements and acts are sufficiently of free will to purge the primary taint of an unlawful invasion, when officers are illegally in the suspect's living quarters and the suspects are under arrest at the time. Wong Sun, supra at 46. Yet, this "unreasonable" belief is just what the Court of Appeals relied upon in making its decision to affirm the admission of evidence in this case.

The applicable rule of law is:

> Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means of sufficiently

> distinguishable to be purged of the primary taint.

Wong Sun, supra at 487; See also Segura, supra at 804; Crews, supra at 469. This rule has also been stated as "whether the unlawful police behavior bore a causal relationship to the acquisition of the evidence." Crews, supra at 469.

In Wong Sun, an illegal arrest and entry was made into the Defendant's living quarters. That Defendant made statements leading to contraband which was located elsewhere. The officers went to that location, and obtained contraband and incriminating statements from another person. These facts are exactly the same in the case now before this Court. This Court in Wong Sun

held that the subsequent evidence could not be used against the original Defendant, because the original illegality tainted all the subsequent evidence. Wong Sun, supra at 473-75. Similarly, in the case now before the Court, the officers used the original illegality of the arrest, search and seizure of Walter Byrd to search other locations and obtain other evidence. The subsequent arrest, search and seizure was derived from the original illegality in Byrd's case, in the same manner as in Wong Sun. The evidence in Byrd's case should have also been excluded.

The situation in Segura was just the opposite. Officers made an illegal entry, but then obtained a search warrant based on information "unrelated" to

the illegal entry. That information was clearly gained before the illegal entry, and therefore is from an independent source and not from the original illegality. Segura, supra at 799. In Segura the evidence was not excluded because it was not "derived from or related to" the illegality in any way; it came from sources "wholly unconnected with the entry;" "no information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." Segura, supra at 814. Nothing could be farther from the case now before the Court, where all information obtained in the original illegal entry led to further searches, and finally to the search warrant and the evidence.

There is no question that there was an illegal entry, arrest, search and seizure made in this case. Two levels of the judiciary have already agreed to that. There should be no question that all further searches and seizures, and therefore all further evidence, would not have been obtained but for the initial illegalities. There should also be no question that such evidence cannot be used at all in a Court of law, or in any other way. Wong Sun, supra, at 485.

There is also no question that the exclusionary rule is intended to deter illegal police activity, and to preserve the integrity of the judiciary and the judicial system. See, e.g., Brown v. Illinois, 422 U.S. 590, 599-600. The State Court

of Appeals decision in this case authorizes, and indeed encourages, police officers to ignore (initially) rules of search and seizure, if contraband can be obtained in a sufficiently derivative manner from that initial illegality. The facts of the case now before the Court indicate that the officers suspected these people of some criminal activity (although there was no factual basis for those suspicions), they saw the opportunity to get into the motel room, and they took that opportunity and conducted exploratory searches until contraband was discovered.

The fourth amendment and the decisions of this Court have been ignored. This Court can not now ignore the sub-

stantial constitutional issues which have to be decided, including whether police officers can escape their initial illegal activities, and whether police officers can use an initial illegal activity to perform exploratory searches until some contraband is found.

THIRD QUESTION PRESENTED FOR REVIEW: WHETHER A DEFENDANT IS DENIED DUE PROCESS OF LAW WHEN HE IS CONVICTED ON THE BASIS OF CIRCUMSTANTIAL EVIDENCE THAT IS EQUALLY CONSISTENT AND RECONCILABLE WITH A REASONABLE THEORY OF INNOCENCE, AND WHERE THAT EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE OFFENSE CHARGED.

The Defendant was convicted of aggravated trafficking in cocaine, in violation of O.R.C. §2925.03(A)(2), which provides that:

> No person shall knowingly do any of the following: . . . prepare for shipment . . . prepare for distribution

> . . . a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another.

Only circumstantial evidence was persented on the elements of "preparation" and "resale" against this petitioner. The evidence was that: the Petitioner had changed motels frequently; a Codefendant requested that the rooms not be cleaned on a daily basis; a large number of phone calls were received by the Petitioner's room; and a large number of "drug paraphernalia" items were found in his room at the time of the arrest. This paraphernalia consisted of items and substances that <u>could</u> be used in the preparation of controlled substances, although the

State's expert witness testified that none of those items had recently been used for that purpose. In addition, substances found on the utensils (sugar and caffeine) did not match the only controlled substance found in the room (a 3.0 gram mixture, divided between four glass vials, of cocaine, lidocaine, and caffeine) and did not contain any controlled substance.

On the other hand, the defense testimony was that the Petitioner and his friend were visiting relatives and friends in the area. They changed motels for reasons varying from dissatisfaction with the locale to cheaper rates elsewhere. They received calls from friends in the area frequently during their stay. More importantly,

Byrd testified that he was a former drug addict, and that the paraphernalia was his, which had accumulated over a period of years. The uncontroverted testimony was that the items of paraphernalia were in storage for about a year at the time of the arrest, and had only been removed from storage the date before the arrest and brought to the motel. The items were in storage along with the possessions of the Defendant's ex-girlfriend, with whom he had lived while he was a drug addict. They were brought to the motel so that her belongings could be separated from his. There was no question that the items were at the motel for only one day prior to the arrest.

In the case now before this Court,

there was nothing but circumstantial evidence offered against the Petitioner on the essential elements of the offense of preparation and resale of a controlled substance. Due process of law requires these elements be proved by the State beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 61 L.Ed 2d 560 (1979); In re: Winship, 397 U.S. 358, 364, 25 L.Ed 2d 368 (1970). Elements of an offense are not proved beyond a reasonable doubt when there is only circumstantial evidence on those elements, and that evidence is reconcilable and consistent with a reasonable theory of innocence.

"An appellate court will reverse a conviction based solely on circumstantial evidence where the evidence

does not, as a matter of law, preclude all reasonable theories of innocence." State v. Jacobozzi (1983), 6 Ohio St.3d 59, 61, 451 N.E.2d 744, quoting State v. Sorgee (1978), 54 Ohio St.2d 464, 377 N.E.2d 782; see also, State v. Italiano (1985), 18 Ohio St. 3d 38, 479 N.E. 2d 857; State v. Kulig (1974), 37 Ohio St.2d 157, 309 N.E.2d 897; State v. Goodin (1978), 56 Ohio St.2d 438, 384 N.E.2d 490.

The evidence presented was completely reconcilable with the Petitioner's reasonable theory of innocence. Petitioner's testimony, supported by other witnesses, was that he was once addicted to drugs, and that the items found in his motel room were used by him to prepare drugs for his personal

use while he was so addicted. He also testified, and was also supported by other witnesses, that he had only brought the items out of storage one day prior to the arrest, and those items were still in their packaging at the time of the arrest. The State's own evidence confirmed that those items were not used to prepare a controlled substance in the recent past. In other words, the State's evidence did not preclude the Defendant's reasonable theory of innocence. In addition, there was absolutely nothing to show that the Defendant prepared anything for shipment or distribution, or for resale, at or anywhere near the time of the arrest.

The presumption of innocence is meaningless at this point, and the

State has effectively been relieved of its burden of proof beyond a reasonable doubt. The State is given a license to avoid the burden of proof by presenting circumstantial evidence only, thus shifting the burden of proof to a Defendant.

This Petitioner has been deprived of due process of law, and has not been convicted beyond a reasonable doubt. This Court must redress this wrong and clarify the extent of prior rulings offered by this Court's decisions and the United States Constitution are useless and without meaning.

CONCLUSION

The decision of the Court of Appeals below failed to redress the constitutional wrongs that have been made against this Petitioner. The Petitioner has no further recourse but this Court. Substantial constitutional questions are involved that can only be addressed by this Court, and without this Court's decision on these issues, the questions will go unresolved.

For the above stated reasons, the Petitioner respectfully requests this Court to accept this case for

full review on the merits of the issues presented.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have this 2nd day of January, 1988, mailed three (3) copies of the within Petition for Writ of Certiorari to Timothy Oliver, Prosecuting Attorney for Warren County, Ohio, 313 East Warren Street, Lebanon, Ohio 45036, by ordinary U. S. mail.

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APPENDIX A

STATE OF OHIO, WARREN COUNTY
IN THE COURT OF COMMON PLEAS

Case Nos: 13238, 13239
13240, 13241

STATE OF OHIO
Plaintiffs

vs

WALTER BYRD, VICKI MIRACLE, GWENDOLYN KLONTZ and MARK MUELLER
Defendants

DECISION AND ENTRY
Filed on August 5, 1986

This matter is before the Court upon a Motion of Defendants to suppress certain items of evidence allegedly owned by one or more of the Defendants seized in Rooms 143 and 144 of the Best Western Motel, and in two automobiles.

On the day in question, as Officer James Goodall approached Rooms 143 and 144 at the Best Western Motel at about 2:00 P.M., he had reliably informed that there had been some sort of fight or alteration in one of the rooms; that a woman had been heard screaming; and that a few minutes earlier a maid had found a handgun laying on a bed in one of the rooms.

When Officer Goodall arrived in front of the two rooms, he noticed Defendant Miracle in a Cadillac automobile parked in front of one of the rooms preparing to leave. The officer spoke to Defendant Miracle and

asked for identification. At this point, Defendant Byrd came to the door of Room 143 and spoke to the officer. The officer asked Defendant Byrd for identification. Defendant Byrd turned back into the motel room, leaving the motel room door open,. The officer stood at the door of the motel room and looked inside the room. We conclude that the officer's act of looking through the open door into the motel room was not an unwarranted invasion of the privacy of any of the Defendants.

Upon looking into the room, the officer noticed three other people in the room; that the

room was somewhat in disarray; and that Defendant Byrd was standing five feet away, leaning over a bed and rummaging in an open suitcase. The officer notice the strap of a gun holster sticking out of the open suitcase. He immediately stepped forward into the room and seized the gun holster. We concluded that the officer's action in entering the room under these circumstances was reasonable and appropriate.

The officer seized the gun holster and found it to be empty. He immediately ordered all of the occupants of the room "up against the wall." Having found an empty gun holster, and knowing

that there was at least one gun unaccounted for on the premises, we conclude that the officer acted reasonably for his own safety in detaining the Defendants by ordering them, in effect, to stand still and remain away from the suitcase.

One or two minutes later, additional officers arrived who frisked the Defendants and read them their "Miranda" rights. Under the circumstances, we find that this search of the Defendants was not unconstitutional and was reasonable and appropriate to assure themselves of the absence of weapons prior to making further inquiries into the matters at hand.

At this point, the officers searched the suitcase and found and seized a gun silencer and ammunition clip. Since we find that, at this point, the officers were in no personal danger or risk from the Defendants and that there was little likelihood that the Defendants could take and seize the contents of the suitcase and, since there was ample time to obtain a search warrant, we conclude that the search of the suitcase and the seizure of the gun silencer and ammunition clip was unlawful.

A few minutes later, Defendant Mueller volunteered the fact that a pistol was laying on the

bed of the adjoining room. He took the officers to that room and the officers recovered a pistol and ammunition clip. Defendant Byrd acknowledged that the pistol was his. We conclude that the seizure of the pistol and ammunition clip was lawful.

After some conversation between Defendant Byrd and the officers, Defendant Byrd signed a written consent to search the Chevrolet automobile that had been leased by Defendant Byrd. We find that Defendant Byrd was not coerced or tricked into giving this consent. Accordingly, we conclude that the search of the Chevrolet automobile was lawful.

The subsequent search of the Cadillac automobile was made pursuant to a search warrant. We conclude that said search was lawful.

We find that all written and oral statements made by the various Defendants to the officers were made voluntarily after they had been made aware of, and understood, their so-called "Miranda" rights.

In accordance with all of the above, the Court grants the Defendants' motions to suppress only in regard to the contents of the suitcase (other than the gun holster). In all other respects the motions to suppress are denied.

/s/ P. Daniel Fedders
P. Daniel Fedders
Judge

cc: James D. Beaton, Esq.
cc: James D. Ruppert, Esq.

APPENDIX B

STATE OF OHIO, WARREN COUNTY
IN THE COURT OF COMMON PLEAS

CASE NO. 13238

STATE OF OHIO
Plaintiff

vs

WALTER KENNETH BYRD
Defendant

ENTRY
Filed on August 18, 1986

This matter came on for trial on August 11-14, 1986 before a jury and the defendant was represented by counsel, James D. Ruppert; the jury having heard the evidence, arguments of counsel, and instructions on the law by the Court, found the defendant, WALTER KENNETH BYRD, GUILTY of DRUG ABUSE, in violation of Section 2925.11(A) of the Ohio Revised Code, a minor misdemeanor, as he stood charged in

Count Two of the indictment; GUILTY of DRUG ABUSE, in violation of Section 2925.11(A) of the Ohio Revised Code, a Felony of the 4th degree, as he stood charged in Count Three of the indictment; GUILTY OF AGGRAVATED TRAFFICKING IN DRUGS, in violation of Section 2925.03(A)(2) of the Ohio Revised Code, a Felony of the 3rd degree, as he stood charged in Count Five of the indictment and the defendant was so informed, Count One, Carrying Concealed Weapon, in violation of Section 2925.12(A)of the Ohio Revised Code, a Felony of the 3rd degree and Count Four, Possession of Counterfeit Controlled Substance, in violation of Section 2925.37(A) of the Ohio Revised Code, a misdemeanor of the 1st degree, were dismissed by

the Court at the end of the State's case, upon defendant's Motion under Rule 29. Count Six of the indictment, Possession of a Dangerous Ordinance, in violation of Section 2923.17(A) of the Ohio Revised Code, a Felony of the 4th degree, was dismissed by the Court on the morning of the first day of trial prior to the jury being enpaneled.

The Court proceeded with the matter of sentencing and inquired of the defendant if he had anything to say why judgment of the Court should not now be pronounced against him and having nothing further to say than he had already said;

WHEREFORE, it is the ORDER of the Court that the defendant, WALTER KENNETH BYRD, be imprisoned and confined in the Ohio State Penitentiary at Chillicothe, Ohio or at any other place as provided by law for a period of one (1) year determinate on his conviction of DRUG ABUSE, in violation of Section 2925.11(A) of the Ohio Revised Code, a Felony of costs of prosecution, taxed herein, for which execution is hereby awarded. WHEREFORE, it is the further ORDER of the Court that WALTER KENNETH BYRD, be imprisoned and confined in the Ohio State Penitentiary at Chillicothe, Ohio, or at any other place as provided by law for a period of two (2) years upon his conviction of AGGRAVATED TRAFFICKING IN DRUGS,

in violation of Section 2925.03(A)(2) of the Ohio Revised Code, a Felony of the 3rd degree as he stood charged in Count Five of the indictment. WHEREFORE, it is the further ORDER of the Court that the defendant, WALTER KENNETH BYRD, pay a fine of $100.00 on his conviction of DRUG ABUSE, in violation of Section 2925.11(A) of the Ohio Revised Code, a minor misdemeanor as he stood charged in Count Two of the indictment. The defendant was further advised of his right to appeal the matter to the Twelfth District Court of Appeals in Middletown, Ohio. WHEREFORE, it is ORDERED that the prison sentences imposed be served consecutively.

WHEREFORE, it is further ORDER of the Court that the defendant be remanded to the custody of the Warren County Sheriff for transportation to the institution forthwith.

/S/ P. Daniel Fedders
P. Daniel Fedders, Judge
Warren County Common Pleas

APPENDIX C

THE SUPREME COURT OF OHIO
COLUMBUS
1987 Term

To Wit: November 4, 1987

Case No: 87-1477

STATE OF OHIO,
Appellee,
V.
WALTER KENNETH BRYD,
Appellant.

ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Warren County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial

constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Ruppert, Bronson & Chicarelli.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 4th day of November

4th day of November, 1987.

/s/Marcia J. Mengel Clerk

/s/Rita A. Johnson Deputy

APPENDIX D

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
WARREN COUNTY, OHIO

CASE NO. CA86-08-056

STATE OF OHIO
Plaintiff-Appellee
vs
WILLIAM MARK MUELLER
Defendant-Appellant

MEMORANDUM DECISION AND JUDGMENT ENTRY
6-1-87

James L. Flannery, Warren County Proseuctor, and G. Michael Butts, Assistant Warren County Prosecutor, 313 E. Warren Street, Lebanon, Ohio 45036, for Plaintiff-Appellee

Ruppert, Bronson & Chicarelli Co., LPA, James D. Rupeprt, 1063 E. Second Street, P.O. Box 369, Franklin, Ohio 45005, for Defendant-Appellant

PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, the transcript

of proceedings, and the brief and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12(A) as follows:

On January 14, 1986, Deputy James Goodall of the Warren County Sheriff's Department was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. Upon arriving, he was informed by the motel manager that there was a disturbance in rooms 143 and 144 and that a maid had found a gun in one of the rooms. These particular rooms had been under surveillance by the Warren County Sheriff's Department for approximately one week for possible drug-related

activity. The surveillance, however, had not produced any evidence of wrongdoing.

Goodall approached the rooms and noticed Vickie Miracle preparing to leave in a Cadillac. He stopped his cruiser directly behind the Cadillac, blocking its exit, and asked Miracle for some identification. About that time, Walter Kenneth Byrd stepped out of the room and asked what the problem was. Goodall indicated that there was a report of some trouble and requested identification from Byrd. Byrd returned to the room and began looked through a suitcase for identification. Standing in the doorway, Goodall noticed a leather shoulder holster in the suitcase. He moved

forward, seized the holster, and ordered all of the occupants of the room against the wall. The occupants included Byrd, Byrd's minor son Ken, appellant, appellant's girlfriend Gwendolyn Clontz, and Miracle, who had returned to the room. As soon as backup officers arrived, the occupants were frisked and advised of their Miranda rights. Goodall then searched through the suitcase and discovered what appeared to be a silencer and a magazine clip containing 9mm ammunition. A few moments later, appellant came forward and said he knew what the trouble was ant that a maid had found a gun in the adjoining room. He took Goodall into the adjoining room and showed him the gun, an Intratec 9mm semi-automatic pistol, and another

clip loaded with 9mm shells, both of which belonged to Byrd.

Byrd expressed concern about his minor son's presence and discussed with Goodall the possibility of letting his son leave in a blue Chevrolet that Byrd had rented. Goodall indicated that Byrd's son might be permitted to leave if Byrd allowed them to search the car and everything was clean. Byrd then signed a consent from which advised him of his right to refuse consent. Byrd's son was not permitted to leave, however, because the search of the Chevrolet revealed three glass vials containing a white residue powder which the officers suspected was cocaine.

The officers then obtained a

search warrant for the Cadillac and both motel rooms. A search of the Cadillac yielded a purse which contained a bottle of black capsules resembling an amphetamine. The purse was later identified as belonging to Miracle. The search of the room yielded numerous boxes containing clothes and personal items, small amounts of marijuana, and several pieces of equipment and paraphernalia commonly used in the preparation of cocaine. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Byrd acknowledged ownership of all the equipment and paraphernalia, including the containers in which the vials were found.

Defendant-appellant Mueller was

initially charged with drug abuse R. C. 2925.03(A)(2), cocaine; carrying a concealed weapon, R. C. 2923.12(A); possession of a dangerous ordnance, R.C. 2923.17(A); and possession of counterfeit controlled substance, R.C. 2925.37(A). All of these charges, with the exception of the aggravated trafficking charge, were subsequently dismissed by the trial judge.

On May 19, 1986 appellant filed a motion to suppress all of the items seized during the search of the automobiles and motel rooms. The trial judge, however, excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officer's safety

since the occupants of the room had already been isolated and were found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, was admissible.

Appellant, Byrd, Miracle and Clontz were all tried together. At the close of the evidence, the trial judge submitted instructions and verdict forms to the jury charging appellant with aggravated trafficking in drugs, R.C. 2925.03(A)(2), cocaine and drug abuse, R.C. 2925.11(A), possession of cocaine, even though appellant was never indicted for possession of cocaine. Defense counsel, however, failed to object and the jury returned a guilty verdict on both charges. The trial judge caught the error and

sentenced appellant only on the aggravated trafficking conviction. It is from this conviction and sentence which appellant appeals and sets forth three assignments of error.

FIRST ASSIGNMENT OF ERROR:

> "The trial court erred in denying defendant's motion to suppress evidence."

SECOND ASSIGNMENT OF ERROR:

> "The trial court erred in convicting defendant of aggravated trafficking."

THIRD ASSIGNMENT OF ERROR:

> "The trial court erred in submitting the charge of drug abuse to the jury."

Appellant's first assignment of error concerns the trial court's denial of his motion to suppress evidence. Appellant contends that his arrest and the subsequent searches

of the automobiles and rooms were unlawful and, therefore, all evidence obtained thereby should have been excluded.

It is well settled that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio (1968), 392 U.S. 1, 22. When an officer makes such an investigative "stop," he is permitted to conduct a reasonable search for weapons when he has reason to believe that he is dealing with an armed and dangerous individual. Id. at 24. Such a search, however, "must be limited to that which is necessary for the

discovery of weapons which might be used to harm the officer or others nearby." Id. at 26.

Here, Goodall responded to a report of a fight in which a weapon may be involved. Upon arriving at the scene he requested identification from the occupants of the room. As Byrd was rummaging through a suitcase looking for identification, Goodall noticed a shoulder holster in a pocket of the suitcase. Under these circumstances, it was reasonable for Goodall to believe that he was dealing with one or more armed individuals. Therefore, the initial detention, seizure of the holster, and pat-down search for weapons was permissible under the parameteres of Terry, supra.

Once the occupants of the room were isolated, however, and the pat-down search indicated that they were unarmed, the exigency justifying the seizure and search for weapons had passed. There was no longer any threat to the officers' safety. Therefore, any further detention or search, absent probable cause, was unlawful. See U.S. v. Place (1983), 462 U.S. 696. Thus the trial court correctly excluded the items seized during the search of the suitcase.

The continued detention of the defendants in the room went beyond the scope of a permissible Terry stop and rose to the level of an arrest. State v. Maure (1984), 15 Ohio ST. 3d 239. "It is axiomatic that to effect an arrest the arresting officer must

have probable cause both to believe that a crime had been committed and that the one apprehended in fact committed the crime." State v. Massey (1975), 49 Ohio App. 2d 272, 273. This requires "that the arresting officer, at the moment of arrest, have sufficient information, based on the facts and circumstances within his knowledge or derived from a reasonable trustworthy source, to warrant a prudent man in believing that an offense had been committed by the accused." State v. Ingram (1984), 20 Ohio App. 3d 55, 57.

Goodall testified at the suppression hearing that, at the time he ordered the defendants against the wall, he had no evidence that any crime

had occurred. He further stated that after finding the "silencer" in the suitcase, he decided to place the defendants under arrest for possession of a dangerous ordnance, even though he could not specifically determine who possessed it. When asked why he continued to detain the defendants, Goodall stated, "I could not determine ownership of the dangerous ordnance -- who it belonged to, or who kneww about it, or who could be a witness to it." Notwithstanding the fact that the object which Goodall considered to be a dangerous ordnance was obtained pursuant to an illegal search, it is clear that there was no probable cause to arrest any of the suspects since there was no evidence linking any one of them

to the alleged dangerous ordnance.

We agree with appellant that the arrest was not supported by probable cause. The question remains, however, as to the effect of the unlawful arrest on the evidence subsequently obtained. Appellant claims that the unlawful arrest tainted all subsequent evidence and therefore such evidence should have been excluded.

The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is a "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Segura v. United States

(1984), 468 U.S. 796, 804-805, (quoting Wong Sun v. United States (1963), 371 U.S. 471, 484). The "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as a dissipate the taint.'" Segura, supra, (quoting Nardone v. United States (1939), 308 U.S. 338, 341). In other words, the evidence is not to be excluded unless the illegalityy was the "but for" cause of the discovery of the evidence. Segura, supra.

For purposes of analysis, the evidence which appellant claims should have been suppressed can be divided into three distinct groups: (1) the gun and ammunition clip given to Goodall

by appellant; (2) all items seized from the blue Chevrolet pursuant to the consent given by Byrd, and (3) all items seized from the Cadillac and motel rooms pursuant to the search warrant. Our review of the record convinces us that all the evidence in each of these groups was "come at by means sufficiently distinguishable" to purge the taint of the unlawful arrest.

At the suppression .hearing, appellant testified that after being patted down and after being read the Miranda rights, all of the accused "were kind of more at ease," even though none of them were free to leave. None of the officers had drawn a weapon and there was no evidence of any threats

or coercive tactics used by the officers. Appellant came forward on his own initiative, took Goodall into the adjoining room and produced the gun and ammunition clip. There are no allegations that appellant's actions were anything but voluntary. Under the totality of the circumstances, we hold as did the trial court, that appellant's production of the gun was an independent act of free will and not the result of any police coercion. See Schneckloth v. Bustamonte (1973), 412 U.S. 218. Therefore, we are unable to conclude that the gun and ammunition clip were "come at by exploitation of the initial illegality." Sequra, supra. Accordingly, there was no error in the admission of the gun and

ammunition clip.

The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from Byrd. We question whether appellant has the right or challenge this consent or the evidence obtained thereby.[1]

---

[1] Fourth Amendment rights are personal rights that may not be asserted vicariously. Rakas v. Illinois (1978), 439 U.S. 128. In order for an accused to assert a Fourth Amendment claim he must have a "reasonable expectation of privacy" in the area searched. Katz v. United States (1967), 389 U.S. 347. Here appellant did not have an expectation of privacy in the blue Chevrolet leased to Byrd. Even if the consent to search the car had been the fruit of an unlawful arrest, it would be the fruit of Byrd's arrest, not appellant's. However, since this standing issue was never raised, we do not rely on it here.

Nevertheless, we find that the consent was valid and the contents of the Chevrolet were admissible.

In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is voluntary under the totality of all the circumstances. Schneckloth, supra; State v. Childress (1983), 4 Ohio St. 3d 217. Here Byrd acknowledged understanding of his Miranda rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although Byrd apparently gave consent with the hope that his son would be released, there was no specific promise

or deal made to that effect. Based upon these circumstances, it is evident that Byrd knowlingly and voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial.

Appellant further contends that the evidence seized from the Cadillac and the motel rooms should have been suppressed because the search warrant was not supported by probable cause. In making a probable cause determination, "[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, *** there is a fair probability that contraband or evidence of a crime will be found in a particular

place." Illinois v. Gates (1983), 462 U.S. 213, 238. In reviewing the magistrate's decision, an appellate court is not to conduct a de novo probable cause hearing. Id. The duty of a reviewing court is to "merely [decide] whether the evidence viewed as a whole provided a ' substantial basis' for the magistrate's finding of probable cause." Massachusetts v. Upton (1984), 466 U.S. 727, 732-733; Gates, supra. Such a dederential standard of review is appropriate in order to effectuate the Fourth Amendment's strong preference for warrants and to encourage use of the warrant process by police officers. Upton, supra.

A review of the facts contained

in the search warrant and supporting affidavit leads us to conclude that there was a substantial basis to support the issuing judg's findsing of probable cause. Although some of the facts viewed independently may not support such a determination, we are confident that when the facts are viewed as a whole, the issuing judge could properly determine that there was a "fair probability" that contraband or evidence of a crime could be found in the Cadillac and motel rooms. Therefore, we find that the warrant was valid and the evidence seized during the subsequent search was admissible.

Although we find that the prolonged detention of appellant and the others constituted an unlawful arrest, we

are unable to conclude that this illegality tainted all subsequent evidence. The connection between the unlawful arrest and the discovery and seizure of the evidence was "so attenuated as to dissipate the taint." Segura, supra. Therefore, appellant's first assignment of error is overruled.

In his second assignment of error appellant asserts that the trial court erred in convicting him of aggravated trafficking. Appellant essentially argues that the conviction was against the manifest weight of the evidence. When considering an assignment of error in a criminal case which attacks the sufficiency of the evidence, it is well established that a reviewing court will not reverse a jury verdict where

there is substantial evidence upon which a jury could reasonable conclude that all the elements of an offense have been proven beyond a reasonable doubt. State v. Eley (1978), 56 Ohio St. 2d 169. The burden of proving the essential elements of the offense beyond a reasonable doubt is on the prosecution. R.C. 2901.05(A). If the prosecution relies upon circumstantial evidence to prove an element of the offense, such evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. State v. Kulig (1974), 37 Ohio St. 2d 157. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an

accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. Id.

Here appellant was convicted of aggravated trafficking in cocaine pursuant to R.C. 2925.03(A)(2), which states, "no person shall knowingly *** [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

The state asserts that there is substantial evidence by which the jury could conclude that appellant prepared cocaine for distribution and knew or had reasonable cause to believe

that the cocaine was intended for resale. The state further asserts that this evidence is irreconcilable with any theory of innocence. We disagree with both propositions.

The record indicates that appellant had been in the company of Byrd for several weeks prior to their arrest. The two had traveled to Ohio from Georgia for the holidays. On January 8, 1986 appellant rented two adjoining rooms at the Best Western Motel in Warren County. A search of the rooms and two cars belonging to Byrd turned up a considerable amount of equipment and drug paraphernalia. Among the paraphernalia were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Byrd acknowledged

ownership and control of all the paraphernalia, including the containers in which the vials were found. Byrd also admitted that he was once addicted to cocaine and had used the equipment for his personal use. The record reflects that all of the equipment and paraphernalia, along with other personal belongings of both Byrd and Miracle had been in storage for several months and had been brought to the motel only the night before the arrest so that Miracle could separate her personal belongings. There was no evidence linking appellant to the equipment or the cocaine other than his association with Byrd and his occupation of the roomo in which some of the items were found.

Before an individual can be found to have prepared a substance for shipment or distribution, it must be shown that the individual had actual or constructive possession of the substance. State v. Miller (1982), Hamilton Appo. No. C-82-0030, unreported. Mere proof of a defendant's presence in the vicinity of illegal drugs is insufficient to show possession. State v. Pruitt (1984), 18 Oiho App. 3d 50. Here there was no evidence that appellant possessed any cocaine, let alone prepared it for shipment or distribution. "None of the evidence presented by the state is irreconcilable with the reasonable theory of innocence that appellant was merely in the company of a former cocaine addict who had removed numerous

items from storage, including some drug paraphernalia, and brought the items to their motel room so that his ex-girlfriend could separate her personal belongings." A conviction cannot rest upon guilt by association. Therefore, we hold that the state failed to meet its burden of proof on the element of preparation for shipment or distribution. Accordingly, appellant's second assignment of error is well taken.

In his third assignment of error appellant asserts that the trial court erred in submitting the charge of drug abuse for possession of cocaine to the jury. Appellant was never indicted for possession of cocaine. The trial judge, however, submitted to the jury

a charge and a verdict form for drug abuse due to possession of cocaine in violation of R.C. 2925.11(A). Defense counsel never objected to the charge and the jury returned a verdict of guilty. Although the trial judge corrected the error by not sentencing appellant on that charge, appellant claims that the submission of the drug abuse charge infected the jury's consideration of his aggravated trafficking charge.

According to Crim. R. 30(A), "a party may not assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of

his objection." "Absent plain error, the failure to object to improprieties in jury instructions, as required by Crim. R. 30, is a waiver of the issue on appeal." State v. Underwood (1983), 3 Ohio St. 3d 12, 13. "The standard for plain error is whether substantial rights of the accused are so adversely affected as to undermine the 'fairness of the guilt determining process.'" State v. Swanson (1984), 16 Ohio App. 3d 375, 377 (quoting State v. Gideons (1977), 52 Ohio App. 2d 70, 77).

The state concedes in its brief "that no where was evidence presented that Mr. Mueller actually possessed the Cocaine" [sic]. Appellant was the only one of four defendants that was not indicted for possession of

cocaine. Two of the defendants, Miracle and Clontz, were acquitted on the possession charges. They were also acquitted on the aggravated trafficking charges. The two charges are so closely related that the presentation of an unindicted possession charge undermines the "fairness of the guilt determining process" on the aggravated trafficking charge. A defendant may only be convicted of an offense for which he has been charged. State v. Stover (1982), 8 Ohio App. 3d 179, 183. Therefore, the jury should never have considered the possession charge. Yet the trial court submitted it to them along with a verdict from and the jury convicted appellant for possession. This clearly rises to

the level of plain error under Crim. R. 52(B). Accordingly, appellant's third assignment of error is well-taken.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, reversed and appellant is discharged.

It is further ordered that a mandate be sent to the Common Pleas Court of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by its counsel, excepts.

KOEHLER, P.J., and HENDRICKSON, J., concur.

JONES, J., concurs in judgment only.

APPENDIX E

IN THE COURT OF APPEALS
TWELFTH APPEALLATE DISTRICT OF OHIO
WARREN COUNTY

CASE NO: CA86-08-057

STATE OF OHIO
Plaintiff-Appellee,

vs.

WALTER KENNETH BYRD,
Defendant-Appellant,

MEMORANDUM DECISION
AND JUDGEMENT ENTRY
6/29/87

James L. Flannery, Warren County Prosecutor, and G. Michael Butts, Assistant Warren County Prosecutor, 313 E. Warren Street, Lebanon, Ohio 45036, for Plaintiff-Appellee.

Ruppert, Bronson & Chicarelli Co., L.P.A., James D. Ruppert, 1063 E. Second Street, P. O. Box 369, Franklin, Ohio 45005, for Defendant-Appellant.

PER CURIAM. This cause came on to be heard upon an appeal,

transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, the transcript of proceedings, and the briefs and oral arguments of counsel.

Now therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12(A) as follows:

On January 14, 1986, Deputy James Goodall of the Warren County Sheriff's Department was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. Upon arriving, he was informed by the motel manager that there was a

disturbance in rooms 143 and 144 and that a maid had found a gun in one of the rooms. These particular rooms had been under surveillance by the Warren County Sheriff's Department for approximately one week for possible drug-related activity. The surveillance, however, had not produced any evidence of wrongdoing.

Goodall approached the rooms and noticed Vickie Miracle preparing to leave in a Cadillac. He stopped his cruiser directly behind the Cadillac, blocking its exit, and asked Miracle for some identification. About that time, defendant-appellant, Walter

Kenneth Byrd, stepped out of room 143 and asked what the problem was. Goodall indicated that there was a report of some trouble and requested identification from appellant. Appellant returned to the room and began looking through a suitcase for identification. Standing in the doorway, Goodall noticed a leather shoulder holster in the suitcase. He moved forward, seized the holster, and ordered all of the occupants of the room against the wall. The occupants included appellant, appellant's minor son Ken, William Mark Mueller, Mueller's girlfriend Gwendolyn Clontz, and Miracle,

who had returned to the room. As soon as backup officers arrived, the occupants were frisked and advised of their Miranda rights. Goodall then searched through the suitcase and discovered what appeared to be a silencer and a magazine clip containing 9mm ammunition. A few moments later, Mueller came forward and said he knew what the trouble was and that a maid had found a gun in the adjoining room. He took Goodall into the adjoining room and showed him the gun, an Intratec 9mm semi-automatic pistol, and another clip loaded with 9mm shells, both of which belonged to appellant.

Appellant expressed concern about his minor son's presence and discussed with Goodall the possibility of letting his son leave in a blue Chevrolet that appellant had rented. Goodall indicated that appellant's son might be permitted to leave if he allowed them to search the car and everything was clean. Appellant then signed a consent form which advised him of his right to refuse consent. Appellant's son was not permitted to leave, however, because of the search of the Chevrolet revealed three glass vials containing a white residue powder which the officers suspected was cocaine.

The officers then obtained a search warrant for the Cadillac and both motel rooms. A search of the Cadillac yielded a purse which contained a bottle of black capsules resembling an amphetamine. The purse was later identified as belonging to Miracle. The search of the room yielded numerous boxes containing clothes and personal items, small amounts of marijuana, and numerous pieces of equipment and paraphernalia commonly used in the preparation of cocaine. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Appellant acknowledged ownership of all

the equipment and paraphernalia, including the containers in which the vials were found.

Appellant was initially charged with two counts of drug abuse, R.C. 2925.11(A), possession of marijuana and cocaine; aggravated trafficking in drugs, R. C. 2925.03(A)(2), cocaine; carrying a concealed weapon, R.C. 2923.17(A); possession of a counterfeit controlled substance, R.C. 2925.37(A). The weapons charges and the counterfeit controlled substance charge were dismissed by the trial court.

On May 19, 1986, appellant filed a motion to suppress all of the items seized during the

search of the automobiles and motel rooms. The trial court excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officers' safety since the occupants of the room were isolated and found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, was admissible.

Appellant, Mueller, Miracle and Klontz were all tried together. A jury returned verdicts of guilty against appellant for possession of marijuana, possession of cocaine, and aggravated trafficking

in cocaine. Appellant was fined $100 on the marijuana charge and sentenced to one year imprisonment for possession of cocaine and two years imprisonment for aggravated trafficking, both prison sentences to run consecutively. Appellant appeals from the possession of cocaine and aggravated trafficking convictions and sets forth three assignment of error for our review.

FIRST ASSIGNMENT OF ERROR:

"The trial court erred in denying defendant's motion to suppress evidence."

SECOND ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of drug abuse."

THIRD ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of aggravated trafficking."

Appellant's first assignment of error concerns the trial court's denial of his motion to suppress evidence. Appellant contends that his arrest and the subsequent searches of the automobiles and rooms were unlawful and, therefore, all evidence obtained thereby should have been excluded.

It is well settled that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though

there is no probable cause to make an arrest." Terry v. Ohio (1968), 392 U.S. 1, 22. When an officer makes such an investigative "stop," he is permitted to conduct a reasonable search for weapons when he has reason to believe that he is dealing with an armed and dangerous individual. Id. at 24. Such a search, however, "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Id. at 26.

Here, Goodall responded to a report of a fight in which a weapon may be involved. Upon arriving at the scene he requested

identification from the occupants of the room. As appellant was rummaging through a suitcase looking for identification, Goodall notice a shoulder holster in a pocket of the suitcase. Under these circumstances, it was reasonable for Goodall to believe that he was dealing with one or more armed individuals. Therefore, the initial detention, seizure of the holster, and pat-down search for weapons was permissible under parameters of Terry, supra.

Once the occupants of the room were isolated, however, and the pat-down search indicated that they were unarmed, the

exigency justifying the seizure and search for weapons had passed. There was no longer any threat to the officers' safety. Therefore, any further detention or search, absent probable cause, was unlawful. See U.S. v. Place (1983), 462 U.S. 696. Thus the trial court correctly excluded the items seized during the search of the suitcase.

The continued detention of the defendants in the room went beyond the scope of a permissible Terry stop and rose to the level of an arrest. State v. Maurer (1984), 15 Ohio St. 3d 239. "It is axiomatic that to effect an arrest the arresting officer

must have probable cause both to believe that a crime has been committed and that the one apprehended in fact committed the crime." State v. Massey (1975), 49 Ohio App. 2d 272, 273. This requires "that the arresting officer, at the moment of arrest, have sufficient information, based on the facts and circumstances within his knowledge or derived from a reasonably trustworthy source, to warrant a prudent man in believing that an offense had been committed by the accused." State v. Ingram (1984), 20 Ohio App. 3d 55, 57.

Goodall testified at the

suppression hearing that, at the time he ordered the defendants against the wall, he had no evidence that any crime had occurred. He further stated that after finding the "silencer" in the suitcase, he decided to place the defendants under arrest for possession of a dangerous ordnance, even though he could not specifically determine who possessed it. When asked why he continued to detain the defendants, Goodall stated, "I could not determine ownership of the dangerous ordnance -who it belonged to, or who knew about it, or who could be a witness to it." Notwithstanding the

fact that the object which Goodall considered to be a dangerous ordnance was obtained pursuant to an illegal search, it is clear that there is no probable cause to arrest any of the suspects since there was no evidence linking any one of them to the alleged dangerous ordnance.

We agree with appellant that the arrest was not supported by probable cause. The question remains, however, as to the effect of the unlawful arrest on the evidence subsequently obtained. Appellant claims that the unlawful arrest tainted all subsequent evidence and therefore such evidence should have been excluded.

The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is a "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Sequra v. Unites States (1984), 468 U.S. 796, 804, 805, (quoting that Mueller's actions were anything but voluntary. Under the totality of the circumstances, we hold as did the trial court, that Mueller's production of the gun was an independent act of free will and not the result

of any police coercion. See Schneckloth v. Bustamonte (1973), 412 U.S. 218. Therefore, we are unable to conclude that the gun and ammunition clip were "come at by exploitation of the initial illegality." Segura, supra 804. Accordingly, there was no error in the admission of the gun and ammunition clip.

The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from appellant. In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is

voluntary under the totality of all the circumstances. Schneckloth, supra; State v. Childress (1983), 4 Ohio St. 3d 217. Here appellant acknowledged understanding of his Miranda rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although appellant apparently gave consent with the hope that his son would be released, there was no specific promise or deal made to that effect. Based upon these circumstances, it is evident that appellant knowingly and

voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial.

Appellant further contends that the evidence seized from the Cadillac and the motel rooms should have been suppressed because the search warrant was not supported by probable cause. In making a probable cause determination, "[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, *** there is a fair probability that contraband or evidence of a crime

will be found in a particular place." Illinois v. Gates (1983), 426 U.S. 213, 238. In reviewing the magistrate's decision, an appellate court is not to conduct a de novo probable cause hearing. Id. The duty of a reviewing court is to "merely [decide] whether the evidence viewed as a whole provided a 'substantial basis' for the magistrate's finding of probable cause." Massachusetts v. Upton (1984), 466 U.S. 727, 732, 733; Gates, supra. Such a deferential standard of review is appropriate in order to effectuate the Fourth Amendment's strong preference for warrants and to encourage use of the warrant process by police officers.

Upton, supra.

A review of the facts contained in the search warrant and supporting affidavit leads us to conclude that there was a substantial basis to support the issuing judge's finding of probable cause. Although some of the facts viewed independently may not support such a determination, we are confident that when the facts are viewed as a whole, the issuing judge could properly determine that there was a "fair probability" that contraband or evidence of a crime could be found in the Cadillac and motel rooms. Therefore, we find that the warrant

was valid and the evidence seized during the subsequent search was admissible.

Although we find that the prolonged detention of appellant and the others constitute an unlawful arrest, we are unable to conclude that this illegality tainted all subsequent evidence. The connection between the unlawful arrest and the discovery and seizure of the evidence was "so attenuated as to dissipate the taint." Segura, supra, 805. Therefore, appellant's first assignment of error is overruled.

In his second assignment of error, appellant claims the trial court erred in convicting

him of drug abuse for possession of cocaine, R.C. 2925.11(A). That statute states that: "[n]o person shall knowingly obtain, possess or use a controlled substance." Appellant contends that the state failed to meet its burden of proof on the element of possession.

"Possession" is defined in R.C. 2925.01(L) as "having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing is found." It is clear, therefore, that appellant could not be convicted upon a

mere showing that he occupied the motel room in which the cocaine was found and we agree with those cases cited by appellant to that effect.[1] Most of the cases cited by appellant, however, are easily distinguishable. In all but Pruitt, the possession convictions were reversed because the only evidence connecting the defendants to the substances was occupation or access to the areas in which the substances were found. In

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1 Appellant relies on State v. Haynes (1971), 25 Ohio St. 2d 264; State v. Stirsman (1974), 67 Ohio Ops. 2d 48; Cincinnati v. McCartney (1971), 30 Ohio App. 2d 45; and State v. Pruitt (1984), 18 Ohio App. 3d 50.

Pruitt, the conviction was upheld because the evidence went far beyond a mere showing of occupation or access. There the illegal substance was found on the floor in the bathroom, less than a foot from the defendant, in a syringe "ready for use." Pruitt, supra at 158.

Here, as in Pruitt, the evidence goes far beyond a mere showing of occupation or access. The cocaine was contained in four glass vials. The vials were found inside the screen housing of a grinder kit commonly used to sift cocaine. Appellant testified that the grinder kit

and several other pieces of equipment and paraphernalia that were found together in a drawer belonged to him. Appellant also admitted that he had used these items to prepare cocaine for his personal use. We hold that these facts constitute substantial evidence by which the jury could reasonably concluded that appellant knowingly possessed the cocaine. State v. Eley (1978), 56 Ohio St. 2d 169. Accordingly, appellant's second assignment of error is overruled.

For this third assignment of error, appellant asserts that he should not have been convicted of aggravated trafficking.

Appellant essentially argues that his conviction was against the manifest weight of the evidence. When considering an assignment of error of this nature, it is well established that a reviewing court will not reverse the jury's verdict where there is substantial evidence upon which a jury could reasonably conclude that all elements of the charged offense have been proven beyond a reasonable doubt. Eley, supra. Naturally, the state bears the burden of proving each element of the charged offense beyond a reasonable doubt. If the state relies upon

circumstantial evidence to prove an essential element of the offense, such evidence must be irreconcilable with any reasonable theory of the accused's innocence in order to support a finding of guilt. State v. Kulig (1974), 37 Ohio St. 2d 157; State v. Italiano (1985), 18 Ohio St. 3d 38, certiorari denied. (1985), ___U.S.____, 106 S.Ct. 234. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. Kulig, supra.

Appellant was convicted of

aggravated trafficking in cocaine in violation of R.C. 2925.03(A)(2), which states that: "[n]o person shall knowingly *** [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

Obviously, there was little, if any, direct evidence that appellant was preparing cocaine for shipment or distribution or actually distributing cocaine, knowing or having reasonable cause to believe such was intended

for sale or resale by himself or another. The state had to rely upon circumstantial evidence to support this particular conviction. There was, however, direct evidence in the record which supported the state's position regarding this offense.

Appellant traveled from New Orleans, to Atlanta, where he met Mueller. The two traveled to the Butler County-Warren County area where they met Miracle and Klontz. The group stayed at four different motels along I-71 before finally settling in at the Best Western. A desk clerk who worked at one of the other motels testified that Mueller

became upset when she informed him that his rooms would no longer be available. She also remembered appellant paying the rent on a daily basis in cash, using fifty and one hundred dollar bills.

The record further reflects that Mueller rented the rooms at the Best Western and paid for each day's stay in cash. Curiously, Mueller requested that the rooms receive no cleaning service, and the rooms went uncleaned for almost an entire week before the manager insisted that the maids be permitted to clean the rooms for obvious health reasons. The maids testified

that appellant and his party remained in room 143, they discovered the handgun which led to the arrest of the appellant and the others.

Three desk clerks at the Best Western also testified as to the number of telephone calls which the group received. The clerk working the 7:00 a.m. to 3:00 p.m. shift testified that room 143 received about ten telephone calls per day. The clerk working the shift from 3:00 p.m. to 11:00 p.m. testified that between January 11 and 14, room 143 received numerous calls, so many that at times the clerk could not leave the switchboard.

Finally, the clerk who worked the 11:00 p.m. to 7:00 a.m. shift testified that on Friday, and Saturday, January 10 and 11, room 143 received approximately twelve calls per hour each night. Appellant and his companions claimed that they only received about a dozen calls the entire time they were registered at the Best Western. When asked about the calls, appellant suggested that it was the holiday season and that he and his party had numerous relatives and friends who lived in the area. The clerks testified, however, that the callers left no messages when room 143 did not answer.

Goodall identified the various drug equipment and paraphernalia seized in room 143. Goodall described each item and its particular use or significance. A non-exhaustive inventory of the items found included the following:

1 Block of Mannitol (a cutting agent used to increase cocaine bulk)
2 Bottles labeled "chemist 100% petroleum ether" (an item used for free-basing cocaine)
1 Item labeled "Technician's Chemical Manufacturing Inositol" (an item often offered for sale as cocaine since it closely resembles actual cocaine),
1 Plastic container labeled "Show-Dry" (an item used to remove moisture from bulk compounds)
1 "Drying Chamber" (an items used for preparing bulk materials from which

the moisture was removed)
2 Deering Precision miniature scales
1 Deering weighing tray for use on the miniature scales
1 Deering funnel
1 Canister containing a white crystalline powder substance
2 Glass vials covered with a valve instrument known as a "dial-a-toot" (an item used to administer individual dosages of cocaine)
1 Glass container labeled "Superior Inositol by Pacific Laboratories in Cal." containing a white crystalline powder substance
1 Plastic baggie containing an off-white powder substance
1 Blue plastic container containing a large lump of a white crystalline powder substance
1 Leather kit containing a mirror (a mirror was commonly used to hold cocaine while it was either cut with a razor blade or snorted through the nostrils)
1 Paper bag from a West

Carrollton, Ohio establishment known as "Philman's" containing numerous glass vials with plastic screw-on lids (Philman's was identified as a commercial retail establishment specializing in the sale of drug paraphernalia)
4 Soda straws approximately two to three inches in length (used for snorting cocaine)
1 Burnt measuring or weighing device
1 Small metal bowl
2 Complete Deering grinder kits with grinders, screen housings and catch dishes (commonly used to ground cocaine into fine powder suitable for snorting)
1 Catch dish
1 Screen housing
1 Rough wire screen
1 Metallic pan with a considerable quantity of white crystalline powder substance
1 Felt or velvet-lined custom designed case containing a mirror, screen, tray, a glass vial in a silver canister, a funnel which fits on the vial, a miniature

scale and counterweights, a base and stand for the scales, a pair of tweezers, and a plastic canister of smaller counterweights.
1 Velvet-lined wooden case with a sliding tray containing a scale similar to the one in the unit above only larger and sturdier, a canister with heavier counterweights and a pair of tweezers
20-25 Glass vials.

This constitutes most of the items found in room 143, all of which appellant claimed as his own from an earlier time when he was a cocaine addict. Appellant further testified that the equipment was not at the Best Western until the night before he and his companions were arrested. According to appellant, the equipment, along

with other personal property, was in the room to be divided up between himself and Miracle.

In State v. Tedrick (Nov. 13, 1984) Clermont App. No. CA 84-10-003, unreported, we stated that when a defendant offers any theory of innocence whatsoever, even if reasonable, Kulig does not require that the defendant be discharged ipso facto. Rather, Kulig stands for the proposition that there are cases when the circumstantial evidence relied upon for a conviction is so attenuated that reasonable minds could never find that the desired fact or essential element had been established beyond a

reasonable doubt. Whether a theory of innocence is reasonable must be determined in view of the weight and credibility that the finder of fact gives to the evidence and, if the trier of fact determines that the connection between what is proven and what is sought to be proven is strong enough to support a finding of proof beyond a reasonable doubt, the circumstantial evidence is sufficient. Id.

Thus, the general principal that a reasonable theory of innocence will prevent a conviction based upon circumstantial evidence is subject to two important qualifications. First, the

determination of the reasonableness of a theory of innocence is a prerogative of the trier of fact -- in this case, the jury. State v. Marsh (May 20, 1985), Butler App. No. CA84-09-108, unreported; State v. Cousin (1982), 5 Ohio App. 3d 32. Second, in order for an alternative theory of innocence to preclude a conviction on circumstantial evidence, the asserted alternative theory must be reasonable and must be based upon testimony which is not subject to rejection on credibility grounds. Id.

Appellant's theory of innocence is that the equipment was his own, the unused relics from his

past when he was a cocaine addict. It is strange, however, that one who has allegedly defeated such a habit would retain the instruments of his addiction, especially such a sizable cache. Furthermore, the manner in which appellant and his companions furtively drifted from one motel to another and the cladestine character of their activities do not support appellant's claim of a holiday visit. The numerous phone calls -- most of which occurred during the nocturnal hours -- do not coincide with appellant's theory, especially when so many of these callers, alleged friends or relatives,

would not leave names or messages when appellant and his companions were unavailable. Certainly, the mere possession of the equipment, standing alone, is insufficient to support the trafficking conviction. However, proof beyond a reasonable doubt within the context of a Kulig argument does not require the state's circumstantial evidence to prove the charged offense beyond all doubt. See, State v. Baltrusch (Apr. 14, 1986) Clermont App. No. CA85-09-066, unreported. A theory of innocence must be reasonable, as opposed to merely possible. State v. Ebright (1983), 11 Ohio App.

3d 97; Tedrick, supra.

Although there was no direct evidence that appellant was actually using the equipment to prepare a substance for shipment or distribution and that appellant knew or had reason to believe that the prepared substance was intended for resale, appellant's secretive conduct and the record as a whole, support the state's position that appellant and the others were using the motel rooms for illegal purposes. The jury heard and listened to the witnesses, made decisions regarding matters of credibility, weighed the evidence and determined the reasonableness of appellant's

theory, obviously finding such theory to be unreasonable. We will not substitute our determination for that of the jury and accordingly find no merit in this assignment of error. The third assignment of error is therefore overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same is hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Warren County,

Ohio for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

JONES and HENDRICKSON, JJ., concur.

KOEHLER, P.J., dissents

KOEHLER, P.J., dissenting. The burden of proving the essential elements of the offense beyond a reasonable doubt is on the prosecution. R.C. 2901.05(A). If the prosecution relies upon circumstantial evidence to prove an element of the offense, such evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilty. State v. Kulig (1974), 37 Ohio St. 2d 157. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt

as to his guilt. Id.

Here appellant was convicted of aggravated trafficking in cocaine pursuant to R.C. 2925.03(A)(2), which states, "no person shall knowingly *** [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that such drug is intended for sale or resale by the offender or another."

The state asserts that there is substantial evidence by which the jury could conclude that appellant prepared cocaine for

distribution and knew or had reasonable cause to believe that the cocaine was intended for resale. The state further asserts that this evidence is irreconcilable with any theory of innocence. I must disagree with both propositions.

Appellant acknowledged ownership of the equipment and paraphernalia found in his motel room. He indicated that the equipment had been in storage for several months and had been brought to the room only the night before the arrest so that Miracle could separate her belongings. Appellant admitted

that he was once addicted and had used the equipment to prepare cocaine for his personal use, but had not done so for several months prior to the arrest. The testimony of the state's expert witness also suggests that this equipment had not bee used to prepare any substances around the dates listed in the indictment.

All of the foregoing testimony is reconcilable and consistent with the reasonable theory of innocence that appellant, a former addict, took numerous items out of storage, including some drug paraphernalia, and brought them to his motel room so that his

ex-girlfriend could separate her belongings. Although there is some evidence that appellant may have used the equipment in the past to prepare cocaine for his personal use, there was nothing to suggest that he had prepared cocaine for shipment or distribution, an essential element of the crime for which he was charged. Mere possession of equipment commonly used in the preparation of a controlled substance is insufficient to sustain a conviction for aggravated trafficking. There must be evidence that the accused actually used the equipment to prepare a substance for shipment or

distribution and that the accused knew or had reason to believe that the prepared substance was intended for resale. Here, there was no such evidence presented by the state. Accordingly, it is my belief that appellant's third assignment of error is well taken.

The majority has abrogated the principle of Kulig and, by requiring a defendant to present and prove by credible evidence a reasonable theory of innocence, has enhanced circumstantial evidence and the inferences therefrom to an impermissible degree. In this cause, the presumption of innocence has

been eroded and the state has been relieved of the burden of proof beyond a reasonable doubt.

Accordingly, I dissent.

Case No. 87-1124

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WALTER KENNETH BYRD,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS, WARREN COUNTY, OHIO

BRIEF IN OPPOSITION OF PETITIONER'S WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

1. An appellate court's reversal of a criminal co-defendant's conviction for aggravated drug trafficking does not further require reversal of the remaining criminal defendant's conviction for the same offense where the evidence is not equally applicable to both defendants.

2. A trial court's suppression of some evidence obtained during a seizure does not require suppression of all other evidence obtained by other means.

   A. The Initial Detention and Search.

   B. The Seizure of the Gun and Ammunition Clip from Room 144.

   C. The Search of the Chevrolet.

   D. The Search Warrant.

3. A conviction for Aggravated Trafficking in cocaine based upon circumstantial evidence is proper where that evidence is irreconcilable with any reasonable theory of innocence of the Defendant.

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APPENDIX A-1

A. Memorandum Decision and Judgment Entry of Twelfth Appellate District Court of Appeals for Warren County, Ohio, *State* v. *Walter Kenneth Byrd*, (Warren App. No. CA-86-08-057), June 29, 1987, unreported A-1

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Ohio Revised Code § 2925.03(A)(2) 14

STATEMENT OF THE CASE

On 2/14/86, Deputy James Goodall of the Warren County Sheriff's Office, Deerfield Township Unit, was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. While enroute, he received a second dispatch that there was a fight in one of the rooms which may involve a weapon. Dep. Goodall proceeded to the hotel under emergency conditions using red light and siren.

Upon arriving at the motel Dep. Goodall was met by the manager who informed him, "It's the people in 143 & 144. There's a fight. There was a woman screaming." He was also informed that a maid had seen a gun in one of the rooms. Dep. Goodall was aware that these particular rooms had been under surveillance by the Warren County Sheriff's Office for approximately one week on an informant's tip for possible drug-related activity. He was further aware the occupants were considered potentially armed and dangerous. As Dep. Goodall proceeded to the area of the two rooms he observed a woman, Vicki Miracle, getting into an automobile parked in front of one of the rooms, preparing to leave. He pulled his cruiser behind the vehicle and asked the female occupant for some identification. While attempting to get identification from the woman in the car, the door of Room 143 opened and the Petitioner appeared, asking the officer what the problem was. Dep. Goodall moved towards the opened door of the motel room, indicated that he was there on a report of some trouble and requested some identification. Petitioner returned to the room (leaving Dep. Goodall by the open door) and began rummaging through a suitcase for identification. As the Petitioner was doing this, Dep. Goodall noticed from the open doorway that there were three, possibly four other individuals in the room. While Dep. Goodall was at the doorway he also observed Petitioner place his hands in the suitcase located on one of the beds. Protruding from the suitcase the deputy observed a leather harness he recognized as being part of a shoulder holster. The

deputy waited for Petitioner to turn away from the suitcase and walk towards the wall at which time Dep. Goodall moved towards the suitcase to secure it and ordered all of the occupants in the room up against the wall. The officer then requested back-up units. Once the back-up units arrived, the occupants were frisked and Mirandized. Dep. Goodall again looked in the suitcase that had contained the shoulder holster and found a silencer and a magazine clip loaded with 9 mm ammunition.

A few moments later William Mueller (another person in the room) came forward and said he knew what the trouble was and that the maid had found the gun in the adjoining room. He voluntarily took Goodall into the adjoining room (#144) and showed him the gun, an Intratec 9 mm semi-automatic pistol, and another clip loaded with 9 mm shells, both of which belonged to Petitioner.

Somewhat later, Petitioner asked Dep. Goodall to allow his seventeen year old son to leave the scene in a blue Chevrolet that Petitioner had rented. Goodall indicated that Petitioner's son might be permitted to leave if Petitioner allowed police to search the car *and* everything was clean. Petitioner then signed a consent form which advised him of his right to refuse consent. Petitioner's son was not permitted to leave, however, because the search of the Chevrolet revealed three glass vials containing a white residue powder which the officers suspected was cocaine.

The officers then obtained a search warrant for the other vehicle (a Cadillac) and both motel rooms. A search of the Cadillac yielded nothing which resulted in a conviction for the Petitioner. The search of the rooms yielded boxes containing clothes and personal items, small amounts of marijuana and a large collection of equipment and paraphernalia commonly used in the preparation of cocaine for distribution and resale. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Appellant acknowledged ownership of all the equipment and

paraphernalia, including the containers in which the vials were found.

Other facts and discoveries regarding this case will be discussed in the Argument section of this Brief as they become pertainent.

Petitioner was initially charged with two counts of Drug Abuse, R.C. 2925.11(A) for Possession of Marijuana and Cocaine; Aggravated Trafficking in Drugs (cocaine), R.C. 2925.03(A)(2); Carrying a Concealed Weapon, R.C. 2923.12(A); Possession of a Dangerous Ordinance, R.C. 2923.17(A); and Possession of a Counterfeit Controlled Substance, R.C. 2925.37(A). The weapons charges and the counterfeit controlled substance charge were dismissed by the trial court.

On May 19, 1986, appellant filed a Motion to Suppress all of the items seized during the search of the automobiles and motel rooms. The trial court excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officers safety since the occupants of the room were isolated and found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, admissible.

Petitioner and three co-defendants were all tried together. As to Petitioner, the jury returned verdicts of guilty for Possession of Marijuana, Possession of Cocaine, and Aggravated Trafficking in Cocaine. Petitioner was fined $100.00 on the marijuana charge and sentenced to one year imprisonment for possession of cocaine and two years imprisonment for Aggravated Trafficking, both prison sentences to run consecutively. Petitioner appealed from the Possession of Cocaine and Aggravated Trafficking convictions to the Twelfth Appellate District. The three assignments of error were overruled on June 29, 1987. On November 4, 1987, the Ohio Supreme Court declined jurisdiction of this matter because no substantial constitutional question existed.

ARGUMENT

RESPONSE TO FIRST QUESTION PRESENTED FOR REVIEW:

AN APPELLATE COURT'S REVERSAL OF A CRIMINAL CO-DEFENDANT'S CONVICTION FOR AGGRAVATED DRUG TRAFFICKING DOES NOT FURTHER REQUIRE REVERSAL OF THE REMAINING CRIMINAL DEFENDANT'S CONVICTION FOR THE SAME OFFENSE WHERE THE EVIDENCE IS NOT EQUALLY APPLICABLE TO BOTH DEFENDANTS.

As the Petitioner points out, where a trier of fact uses different facts to convict co-defendants of the same offense and one defendant's conviction is reversed on appeal, a reviewing court is not required to reverse the remaining conviction. *Marcoquisseppe* v. *State* (1926), 114 Ohio St. 229, 151 N.E. 2d 182. A reading of the Twelfth District Court of Appeals decision in *State* v. *Mueller* (War. App. No. 86-08-056), June 1, 1987 amply demonstrates there were different facts used by the jury to convict each of the Aggravating Trafficking charges. See Petitioner's Appendix, Parts D & E.

Specifically, Petitioner was an admitted cocaine addict in the past. He had used the trafficking equipment and it was owned by him. He also possessed cocaine at that same time and location as he did the equipment. None of that evidence applied to Co-defendant Mueller. Mueller was merely present with Petitioner.

The Petitioner asserts that he received discriminatory treatment under the law as compared to another co-defendant (Mueller). There is no question that Petitioner and Mueller are within the same classification for Equal Protection purposes. In this situation, the Equal Protection Clause requires more than mere difference in result. It requires a showing of discriminatory motivation. Petitioner has failed to show or even assert such a motivation.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's first question presented for review.

RESPONSE TO SECOND QUESTION PRESENTED FOR REVIEW:

A TRIAL COURT'S SUPPRESSION OF SOME EVIDENCE OBTAINED DURING A DETAINMENT DOES NOT REQUIRE SUPPRESSION OF ALL OTHER EVIDENCE OBTAINED BY OTHER MEANS.

A. THE INITIAL DETENTION AND SEARCH.

It is well settled that a police officer may investigate possible criminal behavior even though there is no probable cause at that time to make an arrest. *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 Sup. Ct. 1868. The officer may conduct a reasonable search for weapons during a *Terry* stop when a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry*, 392 U.S. at 27. Again, probable cause for an arrest is not required.

In this case, Dep. Goodall of the Warren County Sheriff's Office was dispatched to the Best Western Motel located in Warren County on report of a disturbance. While enroute the dispatcher recontacted him and indicated that there was a fight in one of the rooms which may involve a weapon. When Dep. Goodall arrived at the motel, the manager informed him as to where the fight was and that there was a woman screaming. In addition, he was told that a maid had seen a gun in the room earlier. As he approached the motel room, Dep. Goodall recalled from police intelligence reports that there was prior police surveillance of these rooms and their occupants regarding possible drug involvement.

Upon arrival, Dep. Goodall requested identification from Petitioner, an occupant in Room 143, as allowed by *Terry*, *supra*. As Petitioner was rummaging through his suitcase, Dep. Goodall observed through the open doorway a shoulder holster protruding from this suitcase.

Under these facts, it is clear that Dep. Goodall was reasonably warranted in his belief, for a variety of reasons,

that his safety was in danger because he was dealing with an armed individual. These reasons were: (1) the dispatcher had indicated to him that a weapon was in the room, (2) the hotel manager at the scene told him there was a fight going on at the room and, further, that a maid had recently seen a gun in that room, (3) he was aware that police intelligence indicated that persons occupying the room were potentially armed and dangerous,[1] (4) his own observation of the shoulder holster in the open suitcase. Therefore, Dep. Goodall was warranted in his initial detention of the Petitioner and seizure of the holster under *Terry*, *supra*. Three levels of the judiciary have held accordingly.

B. THE SEIZURE OF THE GUN AND AMMUNITION CLIP FROM ROOM 144.

The trial court did not consider Dep. Goodall's continued search of the suitcase in Room 143 after his back-up units had arrived as legal. The trial court concluded that the suspects and the contents of the bag presented no personal danger or risk to officers at that time. Therefore, the search absent a warrant was illegal and the evidence (a silencer and magazine clip loaded with 9 mm ammunition) obtained from the suitcase was suppressed. See Petitioner's Appendix, Part A, page 6.

The issue then becomes whether the gun (an Intratec 9 mm semi-automatic pistol) and the accompanying ammunition clip obtained subsequently in Room 144 from William Mueller, a co-defendant and occupant of the room, are sufficiently distinguishable from any prior illegality regarding the search of the suitcase to be purged of the primary taint. *Segura* v. *United States* (1984), 468 U.S. 796, 804-805. The

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[1] Officers quite often must rely on many types of police intelligence reports including "be on the look-out" flyers and information from their own dispatchers. *United States* v. *Hensley* (1985), 469 U.S. ____, 105 Sup. Ct. ____, 83 L. Ed. 2d 604.

evidence is not to be excluded unless the illegality was the "but for" cause of the discovery of the evidence. *Segura, supra.*

The facts of this case indicate, and the Twelfth Appellate Court duly noted, that Mueller came forward on his own initiative without any threats or coercive tactics used by the officers. Mueller voluntarily took Dep. Goodall into the next room (#144) and showed him the gun and clip in question (both of which belonged to Petitioner). This occurred *after* everyone was read the *Miranda* rights. None of the officers had drawn a weapon. Mueller testified at the suppression hearing that at the time he came forward, it was his belief that all the accused in the room "were kind of more at ease". Therefore, the Twelfth Appellate Court was correct in holding "that Mueller's production of the gun was an independent act of free will and not the result of police coercion", under the totality of the circumstances.[2]

It should be noted that Petitioner was not convicted of possessing this weapon at trial.

C. THE SEARCH OF THE CHEVROLET.

After the initial detention, but before the execution of the search warrant, Petitioner asked Dep. Goodall to allow Petitioner's seventeen year old son to leave the scene in a blue Chevrolet rented by Petitioner. Dep. Goodall indicated this might be possible if Petitioner granted police permission to search the car and further that everything was clean. Petitioner then signed a written consent to search form which informed Petitioner of his right to refuse. The search yielded three glass vials containing a white residue powder that later proved to be cocaine.

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[2] See Respondent's Appendix, Part A, for the complete 6/29/87 decision of the Twelfth Appellate District of Ohio. Please note that much of that court's reasoning on this particular issue appears to have been inadvertently omitted by Petitioner.

The Twelfth Appellate District of Ohio most clearly and succinctly analyzed these facts, and concluded the following:

> "The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from Appellant. In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is voluntary under the totality of all the circumstances. *Schneckloth* (1973), 412 U.S. 218; *State* v. *Childress* (1983), 4 Ohio St. 3d 217. Here appellant acknowledged understanding of his *Miranda* rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although appellant apparently gave consent with the hope that his son would be released, there was no specific promise or deal made to that effect. Based upon these circumstances, it is evident that appellant knowingly and voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial." See Petitioner's Appendix, Part E, pages 19 and 20.

D. THE SEARCH WARRANT.

The Petitioner contends that the vast amount of drug manufacturing paraphernalia and equipment discovered pursuant to the search warrant secured by Dep. Goodall should be suppressed as the fruit of a prior illegality. Respondent respectfully submits that this evidence came about by means wholly separate, distinguishable, and constitutional from the alleged illegality.

As discussed in Part A of this issue, the initial detention of Petitioner in Room 143 and seizure of the shoulder holster was permissible under *Terry*, *supra*. Three levels of the judiciary have so held.

As discussed in Part B of this issue, the seizure of the 9 mm semi-automatic pistol and accompanying ammunition clip

from Room 144 was permissible as a voluntary, independent act of free will on the part of co-defendant Mueller. Three levels of the judiciary have so held.

As discussed in Part C of this issue, the seizure of the three glass vials containing a residue of cocaine from the Chevrolet rented by Petitioner was permissible pursuant to a free and voluntary consent to search knowingly, voluntarily, and intelligently signed by Petitioner after being advised of his right to refuse (and also after being Mirandized in Room 143). Again, three levels of the judicary have so held.

In addition, the affidavit for the search warrant also contained the other facts listed in the statement of the case section of this brief pertaining to the informant's tip and resulting surveillance, and the hotel's complaint regarding the fight. Also, that pursuant to Dep. Goodall's considerable training and experience as a police officer (including three years as an undercover narcotics officer) he recognized the white powder residue to be cocaine. The affidavit further revealed how this information and evidence was collected. None of the above information is alleged to be falsely represented in the affidavit. The search warrant was then approved by a local, neutral, and detached magistrate and was limited in scope to the two motel rooms and the other vehicle involved (a Cadillac) and only for weapons, drugs, drug manufacturing equipment, and money. The police in good faith reasonably relied on the magistrate's decision. There is no contention by Petitioner that the police improperly executed the warrant.

The only illegality cited by the three lower courts pertains to the search of Petitioner's suitcase in Room 143, which occurred *after* the initial seizure of the shoulder holster. Therefore, only this evidence (a silencer and magazine clip loaded with 9 mm ammunition) was ultimately suppressed by the trial court. However, three levels of the judiciary have held that under the totality of the circumstances, there was a substantial basis for the magistrate's issuance of the search

warrant based on all the information contained therein. *Illinois* v. *Gates* (1983), 462 U.S. 213; *Massachusetts* v. *Upton* (1984), 466 U.S. 727. Clearly, it cannot be argued that none of this evidence could have been discovered but for the seizure of the silencer and clip from the suitcase. *Segura*, *supra*. Finally, the police in good faith reasonably relied on the magistrate's issuance of the warrant. *United States* v. *Leon* (1984), 468 U.S. ____, 104 Sup. Ct. ____, 82 L.Ed. 2d 677.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's second question presented for review.

RESPONSE TO THIRD QUESTION PRESENTED FOR REVIEW:

A CONVICTION FOR AGGRAVATED TRAFFICKING IN COCIANE BASED UPON CIRCUMSTANTIAL EVIDENCE IS PROPER WHERE THAT EVIDENCE IS IRRECONCILABLE WITH ANY REASONABLE THEORY OF INNOCENCE OF THE DEFENDANT.

Petitioner in his third question presented for review asserts essentially that his conviction on the charge of Aggravated Trafficking is against the weight of the evidence. The Respondent submits that circumstances surrounding Petitioner's arrest would lead the trier of fact to only one conclusion: that he was involved in the preparation or distribution of cocaine for sale.

The Twelfth District Court of Appeals most clearly and completely stated the facts that supported the Aggravated Trafficking conviction:

> "Appellant (Petitioner) traveled from New Orleans, to Atlanta, where he met Mueller. The two traveled to the Butler County-Warren County area where they met Miracle and Klontz. The group stayed at four different motels along I-71 before finally settling in at the Best Western. A desk clerk who worked at one of the other motels testified that Mueller became upset when she informed him that his rooms would no longer be available. She also remembered appellant paying the rent on a daily basis in cash, using fifty and one hundred dollar bills.
>
> "The record further reflects that Mueller rented the rooms at the Best Western and paid for each day's stay in cash. Curiously, Mueller requested that the rooms receive no cleaning service, and the rooms went uncleaned for almost an entire week before the manager insisted that the maids be permitted to clean the rooms for obvious health reasons. The maids testified that appellant and his party remained in room 143 while it was

cleaned. When the maids went next door to clean room 144, they discovered the handgun which led to the arrest of appellant and the others.

"Three desk clerks at the Best Western also testified as to the number of telephone calls which the group received. The clerk working at 7:00 a.m. to 3:00 p.m. shift testified that room 143 received about ten telephone calls per day. The clerk working the shift from 3:00 p.m. to 11:00 p.m. testified that between January 11 and 14, room 143 received numerous calls, so many that at times the clerk could not leave the switchboard. Finally, the clerk who worked the 11:00 p.m. to 7:00 a.m. shift testified that on Friday and Saturday, January 10 and 11, room 143 received approximately twelve calls per hour each night. Appellant and his companions claimed that they only received about a dozen calls the entire time they were registered at the Best Western. When asked about the calls, appellant suggested that it was the holiday season and that he and his party had numerous relatives and friends who lived in the area. The clerks testified, however, that the callers left no messages when room 143 did not answer.

"Goodall identified the various drug equipment and paraphernalia seized in room 143. Goodall described each item and its particular use of significance. A non-exhaustive inventory of the items found included the following:

> 1 block of Mannitol (a cutting agent used to increase cocaine bulk),
>
> 2 bottles labeled "chemist 100% petroleum ether" (an item used for free-basing cocaine),
>
> 1 item labeled "Technician's Chemical Manufacturing Inositol" (an item often offered for sale as cocaine since it closely resembles actual cocaine),
>
> 1 Plastic container labeled "Show-Dry" (an item used to remove moisture from bulk compounds),

1 "Drying Chamber" (an item used for preparing bulk materials from which the moisture was removed),

2 Deering precision miniature scales,

1 Deering weighing tray for use on the miniature scales,

1 Deering funnel,

1 Canister containing a white crystalline powder substance,

2 Glass vials covered with a valve instrument known as a "dial-a-toot" (an item used to administer individual dosages of cocaine),

1 Glass container labeled "Superior Inositol by Pacific Laboratories in Cal." containing a white crystalline powder substance,

1 Plastic baggie containing an off-white powder substance,

1 Blue plastic container containing a large lump of a white cyrstalline powder substance,

1 Leather kit containing a mirror (a mirror was commonly used to hold cocaine while it was either cut with a razor blade or snorted through the nostrils),

1 Paper bag from a West Carrollton, Ohio, establishment known as "Philman's" containing numerous glass vials with plastic screw-on lids (Philman's was identified as a commercial retail establishment specializing in the sale of drug paraphernalia),

4 Soda straws approximately two to three inches in length (used for snorting cocaine),

1 Burnt measuring or weighing device,

1 Small metal bowl,

2 Complete Deering grinder kits with grinders, screen housings and catch dishes (commonly used to ground cocaine into fine powder suitable for snorting),

1 Catch dish,

1 Screen housing,

1 Rough wire screen,

1 Metallic pan with a considerable quantity of white crystalline powder substance,

1 Felt or velvet-lined custom designed case containing a mirror, screen, tray, a glass vial in a silver canister, a funnel which fits on the vial, a miniature scale and counterweights, a base and stand for the scales, a pair of tweezers, and a plastic canister of smaller counterweight,

1 Velvet-lined wooden case with a sliding tray containing a scale similar to the one in the unit above only larger and sturdier, a canister with heavier counterweights, and a pair of tweezers, 20-25 glass vials."

See Petitioner's Appendix, Part E, pages 32-39.

The Petitioner voluntarily admitted ownership of these items, claiming he had acquired them from an earlier period when he was a cocaine addict. The record contains detailed descriptions of how these items were necessary to cut, grind, sift, dry, increase bulk amount, weigh and package cocaine. Items such as these are very commonly used to prepare cocaine for shipment or distribution when it is intended for sale or resale. See Sec. 2925.03(A)(2) O.R.C. Any claim that this property was merely for personal use is clearly ludicrous. This is especially convincing considering the shear volume of materials and that they were gathered together in the hotel

room by the Petitioner. Even in his defense, Petitioner admitted it was his desire to keep the above listed items. In addition, cocaine was actually found in four of the vials, and the Defendant-Appellant was convicted of possessing that substance.

Clearly, the evidence went well beyond the Petitioner's simultaneous possession of these drug trafficking items and the cocaine. There was much testimony regarding Petitioner's actions and the circumstances surrounding his possession of said items.

This evidence is to be considered against the Petitioner's theory of innocence. That theory begins with his claim that he changed motels for various legitimate reasons, including lack of vacancy and a search for cheaper rates. The only evidence presented here was his own assertions, as well as those of partners and girlfriends. No evidence came from sources connected to the hotels themselves. The phone calls were explained by bald assertions that they were messages from the many alleged friends and relatives in the area. However, the calls were extremely voluminous, made at odd hours, and the callers did not leave names or messages when no one answered in the rooms. Further, none of these friends or relatives testified at the trial.

In this same spirit, Petitioner submitted that the vast amount of drug trafficking equipment recovered was only in his actual possession for one day or less. Further, that despite their admitted suitability for use in drug trafficking, he was not using this "miniature laboratory" for the preparation or distribution of cocaine, such as the type he was convicted of possessing at the same scene.

The jury simply decided, after weighing all the evidence and considering the credibility of each witness, that the Petitioner had not presented a reasonable theory of innocence. Further, the jury obviously did not come up with any alternative reasonable theory of innocence not forwarded by the

Petitioner, *State* v. *Kulig* (1974), 37 Ohio St. 2d 157; *State* v. *Ebright* (1983), 11 Ohio App. 3d 97.

The Respondent submits that Petitioner is not claiming that any lower court has applied the wrong law or that a law relied upon is unconstitutional. Petitioner merely disagrees with the decision made based upon the testimony presented — a decision upon which three lower courts agree.

For the foregoing reasons, Respondent respectfully submits that this Court should decline review of Petitioner's third question presented for review.

CONCLUSION

The Respondent respectfully submits that the thrust of Petitioner's argument is not that the state courts of Ohio have applied law on a federal question in a way that is in conflict with other state or federal courts or this Court. Nor does Petitioner submit that the questions here presented have not been previously settled by this Court. Rather, Petitioner's main argument is that he disagrees with the conclusions of law by the lower courts based on the facts presented at the trial court level — legal conclusions Respondent submits were made pursuant to application of the correct law. In essence, Petitioner submits that the decisions of the lower courts were against the manifest weight of the evidence.

For the above reasons, Respondent respectfully requests this Court to decline review in this matter.

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that I have this ____ day of February, 1988 mailed three (3) copies of the within Brief in Opposition to James D. Ruppert, 1063 East Second Street, P.O. Box 369, Franklin, Ohio 45005, by ordinary U.S. mail.

TIMOTHY A. OLIVER
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APPENDIX

Case No. CA86-08-057

In The Court of Appeals
Twelfth Appellate District of Ohio
Warren County

STATE OF OHIO,
Plaintiff-Appellee,

vs.

WALTER KENNETH BYRD,
Defendant-Appellant.

MEMORANDUM DECISION AND JUDGMENT ENTRY
(Filed June 29, 1987)

James L. Flannery, Warren County Prosecutor, and G. Michael Butts, Assistant Warren County Prosecutor, 313 E. Warren Street, Lebanon, Ohio 45036, for Plaintiff-Appellee.

Ruppert, Bronson & Chicarelli Co., L.P.A., James D. Ruppert, 1063 E. Second Street, P.O. Box 369, Franklin, Ohio 45005, for Defendant-Appellant.

PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, the transcript of proceedings, and the briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12(A) as follows:

On January 14, 1986, Deputy James Goodall of the Warren

County Sheriff's Department was dispatched to the Best Western Motel located on Mason-Montgomery Road in Warren County, Ohio. Upon arriving, he was informed by the motel manager that there was a disturbance in rooms 143 and 144 and that a maid had found a gun in one of the rooms. These particular rooms had been under surveillance by the Warren County Sheriff's Department for approximately one week for possible drug-related activity. The surveillance, however, had not produced any evidence of wrongdoing.

Goodall approached the rooms and noticed Vickie Miracle preparing to leave in a Cadillac. He stopped his cruiser directly behind the Cadillac, blocking its exit, and asked Miracle for some identification. About that time, defendant-appellant, Walter Kenneth Byrd, stepped out of room 143 and asked what the problem was. Goodall indicated that there was a report of some trouble and requested identification from appellant. Appellant returned to the room and began looking through a suitcase for identification. Standing in the doorway, Goodall noticed a leather shoulder holster in the suitcase. He moved forward, seized the holster, and ordered all of the occupants of the room against the wall. The occupants included appellant, appellant's minor son Ken, William Mark Mueller, Mueller's girlfriend Gwendolyn Clontz, and Miracle, who had returned to the room. As soon as backup officers arrived, the occupants were frisked and advised of their *Miranda* rights. Goodall then searched through the suitcase and discovered what appeared to be a silencer and a magazine clip containing 9mm ammunition. A few moments later, Mueller came forward and said he knew what the trouble was and that a maid had found a gun in the adjoining room. He took Goodall into the adjoining room and showed him the gun, an Intratec 9mm semi-automatic pistol, and another clip loaded with 9mm shells, both of which belonged to appellant.

Appellant expressed concern about his minor son's presence and discussed with Goodall the possibility of letting his son leave in a blue Chevrolet that appellant had rented. Goodall indicated that appellant's son might be permitted to leave if

he allowed them to search the car and everything was clean. Appellant then signed a consent form which advised him of his right to refuse consent. Appellant's son was not permitted to leave, however, because the search of the Chevrolet revealed three glass vials containing a white residue power which the officers suspected was cocaine.

The officers then obtained a search warrant for the Cadillac and both motel rooms. A search of the Cadillac yielded a purse which contained a bottle of black capsules resembling an amphetamine. The purse was later identified as belonging to Miracle. The search of the room yielded numerous boxes containing clothes and personal items, small amounts of marijuana, and numerous pieces of equipment and paraphernalia commonly used in the preparation of cocaine. Among the equipment were four vials which contained a mixture of lidocaine, cocaine, and caffeine. Appellant acknowledged ownership of all the equipment and paraphernalia, including the containers in which the vials were found.

Appellant was initially charged with two counts of drug abuse, R.C. 2925.11(A), possession of marijuana and cocaine; aggravated trafficking in drugs, R.C. 2925.03(A)(2), cocaine; carrying a concealed weapon, R.C. 2923.12(A); possession of a dangerous ordnance, R.C. 2923.17(A); and possession of a counterfeit controlled substance, R.C. 2925.37(A). The weapons charges and the counterfeit controlled substance charge were dismissed by the trial court.

On May 19, 1986 appellant filed a motion to suppress all of the items seized during the search of the automobiles and motel rooms. The trial court excluded only the items seized during Goodall's search of the suitcase. The court held that the search of the suitcase was not justified out of concern for the officers' safety since the occupants of the room were isolated and found to be unarmed. The court held that all other evidence was lawfully obtained and, therefore, was admissible.

Appellant, Mueller, Miracle and Klontz were all tried together. A jury returned verdicts of guilty against appellant for possession of marijuana, possession of cocaine, and ag-

gravated trafficking in cocaine. Appellant was fined $100 on the marijuana charge and sentenced to one year imprisonment for possession of cocaine and two years imprisonment for aggravated trafficking, both prison sentences to run consecutively. Appellant appeals from the possession of cocaine and aggravated trafficking convictions and sets forth three assignments of error for our review.

FIRST ASSIGNMENT OF ERROR:

"The trial court erred in denying defendant's motion to suppress evidence."

SECOND ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of drug abuse."

THIRD ASSIGNMENT OF ERROR:

"The trial court erred in convicting defendant of aggravated trafficking."

Appellant's first assignment of error concerns the trial court's denial of his motion to suppress evidence. Appellant contends that his arrest and the subsequent searches of the automobiles and rooms were unlawful and, therefore, all evidence obtained thereby should have been excluded.

It is well settled that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio* (1968), 392 U.S. 1, 22. When an officer makes such an investigative "stop," he is permitted to conduct a reasonable search for weapons when he has reason to believe that he is dealing with an armed and dangerous individual. *Id.* at 24. Such a search, however, "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26.

Here, Goodall responded to a report of a fight in which a weapon may be involved. Upon arriving at the scene he re-

quested identification from the occupants of the room. As appellant was rummaging through a suitcase looking for identification, Goodall noticed a shoulder holster in a pocket of the suitcase. Under these circumstances, it was reasonable for Goodall to believe that he was dealing with one or more armed individuals. Therefore, the initial detention, seizure of the holster, and pat-down search for weapons was permissible under the parameters of *Terry, supra.*

Once the occupants of the room were isolated, however, and the pat-down search indicated that they were unarmed, the exigency justifying the seizure and search for weapons had passed. There was no longer any threat to the officers' safety. Therefore, any further detention or search, absent probable cause, was unlawful. See *U.S.* v. *Place* (1983), 462 U.S. 696. Thus the trial court correctly excluded the items seized during the search of the suitcase.

The continued detention of the defendants in the room went beyond the scope of a permissible *Terry* stop and rose to the level of an arrest. *State* v. *Maurer* (1984), 15 Ohio St. 3d 239. "It is axiomatic that to effect an arrest the arresting officer must have probable cause both to believe that a crime has been committed and that the one apprehended in fact committed the crime." *State* v. *Massey* (1975), 49 Ohio App. 2d 272, 273. This requires "that the arresting officer, at the moment of arrest, have sufficient information, based on the facts and circumstances within his knowledge or derived from a reasonably trustworthy source, to warrant a prudent man in believing that an offense had been committed by the accused." *State* v. *Ingram* (1984), 20 Ohio App. 3d 55, 57.

Goodall testified at the suppression hearing that, at the time he ordered the defendants against the wall, he had no evidence that any crime had occurred. He further stated that after finding the "silencer" in the suitcase, he decided to place the defendants under arrest for possession of a dangerous ordnance, even though he could not specifically determine who possessed it. When asked why he continued to detain the defendants, Goodall stated, "I could not determine ownership of the dangerous ordnance — who it belonged to, or who

knew about it, or who could be a witness to it." Notwithstanding the fact that the object which Goodall considered to be a dangerous ordnance was obtained pursuant to an illegal search, it is clear that there was no probable cause to arrest any of the suspects since there was no evidence linking any one of them to the alleged dangerous ordnance.

We agree with appellant that the arrest was not supported by probable cause. The question remains, however, as to the effect of the unlawful arrest on the evidence subsequently obtained. Appellant claims that the unlawful arrest tainted all subsequent evidence and therefore such evidence should have been excluded.

The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is a "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura* v. *United States* (1984), 468 U.S. 796, 804, 805, (quoting *Wong Sun* v. *United States* [1963], 371 U.S. 471, 484.) The "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.' " *Segura*, *supra*, (quoting *Nardone* v. *United States* [1939], 308 U.S. 338, 341). In other words, the evidence is not to be excluded unless the illegality was the "but for" cause of the discovery of the evidence. *Segura*, *supra*.

For purposes of analysis, the evidence which appellant claims should have been suppressed can be divided into three distinct groups: (1) the gun and ammunition clip given to Goodall by Mueller; (2) all items seized from the blue Chevrolet pursuant to the consent given by appellant, and (3) all items seized from the Cadillac and motel rooms pursuant to the search warrant. Our review of the record convinces us that all the evidence in each of these groups was "come at by means sufficiently distinguishable" to purge the taint of the unlawful arrest.

At the suppression hearing, Mueller testified that after being patted down and after being read the *Miranda* rights, all

of the accused "were kind of more at ease," even though none of them were free to leave. None of the officers had drawn a weapon and there was no evidence of any threats or coercive tactics used by the officers. Mueller came forward on his own initiative, took Goodall into the adjoining room and produced the gun and ammunition clip, which belonged to appellant. There are no allegations that Mueller's actions were anything but voluntary. Under the totality of the circumstances, we hold as did the trial court, that Mueller's production of the gun was an independent act of free will and not the result of any police coercion. See *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218. Therefore, we are unable to conclude that the gun and ammunition clip were "come at by exploitation of the initial illegality." *Segura*, *supra*, 804. Accordingly, there was no error in the admission of the gun and ammunition clip.

The propriety of admitting the evidence seized from the blue Chevrolet turns upon the validity of the consent to search obtained from appellant. In order to waive his Fourth Amendment privilege against unreasonable searches and seizures, the accused must give a consent which is voluntary under the totality of all the circumstances. *Schneckloth*, *supra*; *State* v. *Childress* (1983), 4 Ohio St. 3d 217. Here appellant acknowledged understanding of his *Miranda* rights. He read and signed a consent form in which he was advised of his right to refuse consent. There were no threats or coercive tactics used by the police. Although appellant apparently gave consent with the hope that his son would be released, there was no specific promise or deal made to that effect. Based upon these circumstances, it is evident that appellant knowingly and voluntarily consented to the search of the Chevrolet and that the fruits thereof were therefore admissible at trial.

Appellant further contends that the evidence seized from the Cadillac and the motel rooms should have been suppressed because the search warrant was not supported by probable cause. In making a probable cause determination, "[t]he task of the issuing magistrate is simply to make a prac-

tical, common sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates* (1983), 462 U.S. 213, 238. In reviewing the magistrate's decision, an appellate court is not to conduct a *de novo* probable cause hearing. *Id.* The duty of a reviewing court is to "merely [decide] whether the evidence viewed as a whole provided a 'substantial basis' for the magistrate's finding of probable cause." *Massachusetts* v. *Upton* (1984), 466 U.S. 727, 732, 733; *Gates*, *supra*. Such a deferential standard of review is appropriate in order to effectuate the Fourth Amendment's strong preference for warrants and to encourage use of the warrant process by police officers. *Upton*, *supra*.

A review of the facts contained in the search warrant and supporting affidavit leads us to conclude that there was a substantial basis to support the issuing judge's finding of probable cause. Although some of the facts viewed independently may not support such a determination, we are confident that when the facts are viewed as a whole, the issuing judge could properly determine that there was a "fair probability" that contraband or evidence of a crime could be found in the Cadillac and motel rooms. Therefore, we find that the warrant was valid and the evidence seized during the subsequent search was admissible.

Although we find that the prolonged detention of appellant and the others constituted an unlawful arrest, we are unable to conclude that this illegality tainted all subsequent evidence. The connection between the unlawful arrest and the discovery and seizure of the evidence was "so attenuated as to dissipate the taint." *Segura*, *supra*, 805. Therefore, appellant's first assignment of error is overruled.

In his second assignment of error, appellant claims the trial court erred in convicting him of drug abuse for possession of cocaine, R.C. 2925.11(A). That statute states that: "[n]o person shall knowingly obtain, possess or use a controlled substance." Appellant contends that the state failed to meet its burden of proof on the element of possession.

"Possession" is defined in R.C. 2925.01(L) as "having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing is found." It is clear, therefore, that appellant could not be convicted upon a mere showing that he occupied the motel room in which the cocaine was found and we agree with those cases cited by appellant to that effect.[1] Most of the cases cited by appellant, however, are easily distinguishable. In all but *Pruitt*, the possession convictions were reversed because the only evidence connecting the defendants to the substances was occupation or access to the areas in which the substances were found. In *Pruitt*, the conviction was upheld because the evidence went far beyond a mere showing of occupation or access. There the illegal substance was found on the floor in the bathroom, less than a foot from the defendant, in a syringe "ready for use." *Pruitt*, *supra*, at 158.

Here, as in *Pruitt*, the evidence goes far beyond a mere showing of occupation or access. The cocaine was contained in four glass vials. The vials were found inside the screen housing of a grinder kit commonly used to sift cocaine. Appellant testified that the grinder kit and several other pieces of equipment and paraphernalia that were found together in a drawer belonged to him. Appellant also admitted that he had used these items to prepare cocaine for his personal use. We hold that these facts constitute substantial evidence by which the jury could reasonably conclude that appellant knowingly possessed the cocaine. *State* v. *Eley* (1978), 56 Ohio St. 2d 169. Accordingly, appellant's second assignment of error is overruled.

For his third assignment of error, appellant asserts that he should not have been convicted of aggravated trafficking. Appellant essentially argues that his conviction was against the manifest weight of the evidence. When considering an assign-

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[1] Appellant relies on *State* v. *Haynes* (1971), 25 Ohio St. 2d 264; *State* v. *Stirsman* (1974), 67 Ohio Ops. 2d 48; *Cincinnati* v. *McCartney* (1971), 30 Ohio App. 2d 45; and *State* v. *Pruitt* (1984), 18 Ohio App. 3d 50.

ment of error of this nature, it is well established that a reviewing court will not reverse the jury's verdict where there is substantial evidence upon which a jury could reasonably conclude that all elements of the charged offense have been proven beyond a reasonably doubt. *Eley, supra.* Naturally, the state bears the burden of proving each element of the charged offense beyond a reasonable doubt. If the state relies upon circumstantial evidence to prove an essential element of the offense, such evidence must be irreconcilable with any reasonable theory of the accused's innocence in order to support a finding of guilt. *State* v. *Kulig* (1974), 37 Ohio St. 2d 157; *State* v. *Italiano* (1985), 18 Ohio St. 3d 38, certiorari denied (1985), ____ U.S. ____, 106 S.Ct. 234. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. *Kulig, supra.*

Appellant was convicted of aggravated trafficking in cocaine in violation of R.C. 2925.03(A)(2), which states that: "[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

Obviously, there was little, if any, direct evidence that appellant was preparing cocaine for shipment or distribution or actually distributing cocaine, knowing or having reasonable cause to believe such was intended for sale or resale by himself or another. The state had to rely upon circumstantial evidence to support this particular conviction. There was, however, direct evidence in the record which supported the state's position regarding this offense.

Appellant traveled from New Orleans, to Atlanta, where he met Mueller. The two traveled to the Butler County-Warren County area where they met Miracle and Klontz. The group stayed at four different motels along I-71 before finally settling in at the Best Western. A desk clerk who

worked at one of the other motels testified that Mueller became upset when she informed him that his rooms would no longer be available. She also remembered appellant paying the rent on a daily basis in cash, using fifty and one hundred dollar bills.

The record further reflects that Mueller rented the rooms at the Best Western and paid for each day's stay in cash. Curiously, Mueller requested that the rooms receive no cleaning service, and the rooms went uncleaned for almost an entire week before the manager insisted that the maids be permitted to clean the rooms for obvious health reasons. The maids testified that appellant and his party remained in room 143 while it was cleaned. When the maids went next door to clean room 144, they discovered the handgun which led to the arrest of the appellant and the others.

Three desk clerks at the Best Western also testified as to the number of telephone calls which the group received. The clerk working the 7:00 a.m. to 3:00 p.m. shift testified that room 143 received about ten telephone calls per day. The clerk working the shift from 3:00 p.m. to 11:00 p.m. testified that between January 11 and 14, room 143 received numerous calls, so many that at times the clerk could not leave the switchboard. Finally, the clerk who worked the 11:00 p.m. to 7:00 a.m. shift testified that on Friday and Saturday, January 10 and 11, room 143 received approximately twelve calls per hour each night. Appellant and his companions claimed that they only received about a dozen calls the entire time they were registered at the Best Western. When asked about the calls, appellant suggested that it was the holiday season and that he and his party had numerous relatives and friends who lived in the area. The clerks testified, however, that the callers left no messages when room 143 did not answer.

Goodall identified the various drug equipment and paraphernalia seized in room 143. Goodall described each item and its particular use or significance. A non-exhaustive inventory of the items found included the following:

1 Block of Mannitol (a cutting agent used to increase cocaine bulk),

2 Bottles labeled "chemist 100% petroleum ether" (an item used for free-basing cocaine),

1 Item labeled "Technician's Chemical Manufacturing Inositol" (an item often offered for sale as cocaine since it closely resembles actual cocaine),

1 Plastic container labeled "Show-Dry" (an item used to remove moisture from bulk compounds),

1 "Drying Chamber" (an item used for preparing bulk materials from which the moisture was removed),

2 Deering Precision miniature scales,

1 Deering weighing tray for use on the miniature scales,

1 Deering funnel,

1 Canister containing a white crystalline powder substance,

2 Glass vials covered with a valve instrument known as a "dial-a-toot" (an item used to administer individual dosages of cocaine),

1 Glass container labeled "Superior Inositol by Pacific Laboratories in Cal." containing a white crystalline powder substance,

1 Plastic baggie containing an off-white powder substance,

1 Blue plastic container containing a large lump of a white crystalline powder substance,

1 Leather kit containing a mirror (a mirror was commonly used to hold cocaine while it was either cut with a razor blade or snorted through the nostrils),

1 Paper bag from a West Carrollton, Ohio, establishment known as "Philman's" containing numerous glass vials with plastic screw-on lids (Philman's was identified as a commercial retail establishment specializing in the sale of drug paraphernalia),

4 Soda straws approximately two to three inches in length (used for snorting cocaine),

1 Burnt measuring or weighing device,

1 Small metal bowl,

2 Complete Deering grinder kits with grinders, screen housings and catch dishes (commonly used to ground cocaine into fine powder suitable for snorting),

1 Catch dish,

1 Screen housing,

1 Rough wire screen,

1 Metallic pan with a considerable quantity of white crystalline powder substance,

1 Felt or velvet-lined custom designed case containing a mirror, screen, tray, a glass vial in a silver canister, a funnel which fits on the vial, a miniature scale and counterweights, a base and stand for the scales, a pair of tweezers, and a plastic canister of smaller counterweights,

1 Velvet-lined wooden case with a sliding tray containing a scale similar to the one in the unit above only larger and sturdier, a canister with heavier counterweights, and a pair of tweezers, 20-25 Glass vials.

This constitutes most of the items found in room 143, all of which appellant claimed as his own from an earlier time when he was a cocaine addict. Appellant further testified that the equipment was not at the Best Western until the night before he and his companions were arrested. According to appellant, the equipment, along with other personal property, was in the room to be divided up between himself and Miracle.

In *State* v. *Tedrick* (Nov. 13, 1984), Clermont App. No. CA84-01-003, unreported, we stated that when a defendant offers any theory of innocence whatsoever, even if reasonable, *Kulig* does not require that the defendants be discharged *ipso*

facto. Rather, *Kulig* stands for the proposition that there are cases when the circumstantial evidence relied upon for a conviction is so attenuated that reasonable minds could never find that the desired fact or essential element had been established beyond a reasonable doubt. Whether a theory of innocence is reasonable must be determined in view of the weight and credibility that the finder of fact gives to the evidence and, if the trier of fact determines that the connection between what is proved and what is sought to be proved is strong enough to support a finding of proof beyond a reasonable doubt, the circumstantial evidence is sufficient. *Id.*

Thus, the general principle that a reasonable theory of innocence will prevent a conviction based upon circumstantial evidence is subject to two important qualifications. First, the determination of the reasonableness of a theory of innocence is a prerogative of the trier of fact — in this case, the jury. *State* v. *Marsh* (May 20, 1985), Butler App. No. CA84-09-108, unreported; *State* v. *Cousin* (1982), 5 Ohio App. 3d 32. Second, in order for an alternative theory of innocence to preclude a conviction on circumstantial evidence, the asserted alternative theory must be reasonable and must be based upon testimony which is not subject to rejection on credibility grounds. *Id.*

Appellant's theory of innocence is that the equipment was his own, the unused relics from his past when he was a cocaine addict. It is strange, however, that one who has allegedly defeated such a habit would retain the instruments of his addiction, especially such a sizable cache. Furthermore, the manner in which appellant and his companions furtively drifted from one motel to another and the clandestine character of their activities do not support appellant's claim of a holiday visit. The numerous phone calls — most of which occurred during the nocturnal hours — do not coincide with appellant's theory, especially when so many of these callers, alleged friends or relatives, would not leave names or messages when appellant and his companions were unavailable. Certainly, the mere possession of the equipment,

standing alone, is insufficient to support the trafficking conviction. However, proof beyond a reasonable doubt within the context of a *Kulig* argument does not require the state's circumstantial evidence to prove the charged offense beyond all doubt. See, *State* v. *Baltrusch* (Apr. 14, 1986), Clermont App. No. CA85-09-066, unreported. A theory of innocence must be reasonable, as opposed to merely possible. *State* v. *Ebright* (1983), 11 Ohio App. 3d 97; *Tedrick*, *supra*.

Although there was no direct evidence that appellant was actually using the equipment to prepare a substance for shipment or distribution and that appellant knew or had reason to believe that the prepared substance was intended for resale, appellant's secretive conduct and the record as a whole, support the state's position that appellant and the others were using the motel rooms for illegal purposes. The jury heard and listened to the witnesses, made decisions regarding matters of credibility, weighed the evidence and determined the reasonableness of appellant's theory, obviously finding such theory to be unreasonable. We will not substitute our determination for that of the jury and accordingly find no merit in this assignment of error. The third assignment of error is therefore overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

JONES and HENDRICKSON, JJ., concur.

KOEHLER, P.J., dissents.

KOEHLER, P.J., dissenting. The burden of proving the essential elements of the offense beyond a reasonable doubt is on the prosecution. R.C. 2901.05(A). It the prosecution relies upon circumstantial evidence to prove an element of the offense, such evidence must be irreconcilable with any reasonably theory of an accused's innocence in order to support a finding of guilt. *State* v. *Kulig* (1974), 37 Ohio St. 2d 157. If the circumstantial evidence is reconcilable and consistent with any reasonable theory of an accused's innocence, the accused cannot be found guilty because there is reasonable doubt as to his guilt. *Id.*

Here appellant was convicted of aggravated trafficking in cocaine pursuant to R.C. 2925.03(A)(2), which states, "no person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another."

The state asserts that there is substantial evidence by which the jury could conclude that appellant prepared cocaine for distribution and knew or had reasonable cause to believe that the cocaine was intended for resale. The state further asserts that this evidence is irreconcilable with any theory of innocence. I must disagree with both propositions.

Appellant acknowledged ownership of the equipment and paraphernalia found in his motel room. He indicated that the equipment had been in storage for several months and had been brought to the room only the night before the arrest so that Miracle could separate her belongings. Appellant admitted that he was once addicted and had used the equipment to prepare cocaine for his personal use, but had not done so for several months prior to the arrest. The testimony of the state's expert witness also suggests that this equipment had not been used to prepare any substances around the dates listed in the indictment.

All of the foregoing testimony is reconcilable and consistent

with the reasonable theory of innocence that appellant, a former addict, took numerous items out of storage, including some drug paraphernalia, and brought them to his motel room so that his ex-girlfriend could separate her belongings. Although there is some evidence that appellant may have used the equipment in the past to prepare cocaine for his personal use, there was nothing to suggest that he had prepared cocaine for shipment or distribution, an essential element of the crime for which he was charged. Mere possession of equipment commonly used in the preparation of a controlled substance is insufficient to sustain a conviction for aggravated trafficking. There must be evidence that the accused actually used the equipment to prepare a substance for shipment or distribution and that the accused knew or had reason to believe that the prepared substance was intended for resale. Here, there was no such evidence presented by the state. Accordingly, it is my belief that appellant's third assignment of error is well-taken.

The majority has abrogated the principle of *Kulig* and, by requiring a defendant to present and prove by credible evidence a reasonable theory of innocence, has enhanced circumstantial evidence and the inferences therefrom to an impermissible degree. In this cause, the presumption of innocence has been eroded and the state has been relieved of the burden of proof beyond a reasonable doubt.

Accordingly, I dissent.

CASE NO: 87-1124

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WALTER KENNETH BYRD,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE TWELFTH APPELLATE DISTRICT COURT OF APPEALS, WARREN COUNTY, OHIO

PETITIONER'S REPLY TO REPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ON STATEMENT OF THE CASE

Several inaccuracies appear in the Respondent's Statement of the Case. First, the Respondent states that Deputy Goodall was "aware" of the surveillance of the Petitioners rooms, which gave him further cause to be wary of the Petitioner. In fact, he actually took part in that surveillance. The week long surveillance detected absolutely no criminal or even suspicious behavior at those rooms, and gave the officers no cause to take any action against the Petitioner.

Further, the "informant's tip" referred to by the Respondent was merely a statement by an unidentified female that there were persons in the area who were preparing for a major drug

transaction, and who were armed and dangerous. But, that alleged informant never gave the location or identity of those persons to which she was referring. The police merely followed the informant (who was a long time friend of the Petitioner) until she went to the Petitioner's room, and the officers then began their surveillance. Contrary to the Respondent's assertion, no one identified the Petitioner as a criminal suspect.

In addition, there was much discrepancy at the trial as to exactly how the officer got into the Petitioner's room, and where he was (in the room already or outside the open door) when he saw the strap hanging out of the open suitcase. It is by no means

conclusive that he was where he was lawfully permitted to be when he saw the shoulder strap.

Finally, several other important misstatements of fact are made within the text of the Respondent's Brief, which will be pointed out in the text of this Reply where they are relevant.

ARGUMENT

REPLY ON FIRST QUESTION PRESENTED FOR REVIEW:

Both Defendants, Walter Byrd and Mark Mueller, were charged with and convicted of the same offense: aggravated trafficking in controlled substances, requiring proof that they prepared a controlled substance for shipment or distribution. O.R.C. §2925.03(A)(2). The evidence disclosed that both Defendants were present in the motel room. Pursuant to the challenged search, the officers recovered various items of drug paraphernalia, which were scientifically tested and failed to disclose any trace of any controlled substance. The State's laboratory expert testified that the

equipment had not been used to prepare any controlled substance. The only controlled substance recovered was found in three tiny vials in a dresser drawer (containing approximately .3 grams of a mixture of cocaine, lidocaine, and caffeine)

In addition, the State's testimony clearly demonstrated that Mr. Mueller (the acquitted Codefendant) refused maid service at the rooms, and that both rooms received a large number of phone calls. There was a large amount of trash discarded from the rooms daily, which also failed to disclose any wrongdoing. There was no cash obtained in the search, other than approximately $20.00 in change.

Based on this body of evidence,

the jury returned verdicts of guilty as to both Defendants. The Court of Appeals concluded that the evidence was not sufficient to convict Mueller and yet in a separate opinion concluded that the same evidence was sufficient to affirm the Petitioner's conviction.

Admittedly there are some facts that differentiate the two Defendants. The Petitioner was admittedly a former cocaine addict, and did own and had used the various paraphernalia items in the past. The testimony was uncontradicted though that this paraphernalia was not present at the motel until the day before the arrest, and that it had been in storage for six months to a year prior to the arrest. None of these differentiating factors

have anything to do with whether either of these Defendants had actually used that paraphernalia to prepare a controlled substance, the material element of the offense charged. All evidence that could have supported the convictions apply to both Defendants equally. That evidence necessary to sustain a conviction on this charge is common to both Defendants.

The Respondent asks this Court to require a "discriminatory motivation" to find a violation of the fifth and fourteenth amendments as to equal protection and due process of law, without citation to authority. How could it be any clearer that the Petitioner had the due process clause of the United States Constitution

(requiring proof beyond a reasonable doubt) applied to him in a discriminatory fashion, when a codefendant was acquitted by the Court of Appeals based on the exact same evidence used to convict him, a distinction that was made without any basis (much less a rational basis). He was absolutely denied equal protection of the law, and this Court is the last hope to redress the prior Court's error.[1]

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1 The greatest irony in this case is that the Petitioner is still in prison, whereas the other Defendant, Mark Mueller, now has a claim pending against the State of Ohio under the Ohio wrongful imprisonment statute, which entitles Mark Mueller to several thousand dollars in damages for the time he was wrongfully imprisoned.

REPLY ON THE SECOND QUESTION PRESENTED FOR REVIEW

The Respondent relies upon an erroneous relation of the facts to support its arguments that the search and seizures in this case were constitutional.

In regard to the Respondent's Section "A," the officer was aware of police surveillance on the Petitioner's rooms, but as has been previously stated, he knew that the surveillance had turned up nothing criminal or suspicious. Further, the officer's detention of the Petitioner clearly exceeded the limits of a Terry stop.

Petitioner disputes the assertion that "three levels of judiciary" have

held that the detention did not exceed Terry. The Trial Court held that the police officers' act of entering the room and "frisking" and "Mirandizing" the Defendants was reasonable, but made no finding as to whether the detention later exceeded permissible limits. The Court of Appeals, held that "the continued detention of the [Petitioner] in the room went beyond the scope of a permissible Terry stop and rose to the level of an arrest . . . . The arrest was not supported by probable cause." See Appendix to Petition, E-14 to E-17. The Ohio Supreme Court (the Respondent's third "level of judiciary") refused to hear the merits of this case.

The Respondent incorrectly states,

in both Sections "C" and "D" that the search of the Chevrolet yielded three vials of what "later proved to be cocaine." The record is clear and unequivocal that the State's expert witness flatly admitted that those vials, recovered from the Chevrolet, subjected to scientific testing, contained absolutely no controlled substances! There was no illegal substance in the three small vials taken from the Chevrolet, which search led to the search warrant for the motel rooms.

Finally, the State cannot rely on United States vs Leon, 468 U.S. 897, 82 L.Ed. 2d 677 (1984), for protection from the suppression of the evidence herein, nor to deny there

is a substantial constitutional question to be decided. An officer must have had "objectively reasonable reliance" on the warrant to receive the benefit of the so called "good faith" exception to the exclusionary rule. Leon, supra at 698. In the Petitioner's case, the officers could not have had objectively reasonable reliance on this warrant. The warrant did not contain a single objective fact to support a finding of probable cause to believe that the Petitioner had engaged in criminal activity, involving the use of illegal substances. See Leon, supra at 693 n.13.

In addition, this Court placed a limitation (that is applicable to the instant case) on the "good faith"

exception to the warrant requirement. A warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" cannot justify "good faith" reliance. Leon, supra at 699, quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975).

The warrant in the instant case is based only on the undisclosed and unproven informant's tip, the officer's suspicions as to the white powder found in the car, and the items found in the room (which were not determined to be illegal). These same items were taken pursuant to a prior illegal search and therefore cannot be the basis for a probable cause determination, regardless of the application of Leon.

Finally, Leon should not be extended to the circumstances herein. If the warrant in this case is held to be reliable enough to avoid the exclusionary rule, police officers will be given future permission to search based on suspicion and conjecture. This result is clearly contrary to the fourth amendment and to the Leon decision. See Leon, supra at 698-99, 693 n.13.

CONCLUSION

For the above stated reasons, and those reasons previously stated, the Petitioner expressly requests this Court to accept this case for full review on the merits.

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PROOF OF SERVICE

I hereby certify that I have this 21st day of April, 1988, mailed three (3) copies of the within Reply to Timothy Oliver, Prosecuting Attorney, Warren County Prosecutor's Office, Law Building, 313 East Warren Street, Lebanon, Ohio 45036.

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